Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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KENTUCKY
LEADERSHIP
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Leadership is a behavior, not a position

CASE LAW UPDATES

FIRST QUARTER

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The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 502 – ACCOMPLICE LIABILITY

Clark v. Com., 2013 WL 399132 (Ky. App. 2013)

FACTS: On December 11, 2009, Prather and Jackson (friends of Clark) kicked in the door of Ogden's home. They stole electronics, cell phones and other items, totaling almost $3,000. Prather called Hardin to ask him to bring a truck and soon, Hardin and Clark arrived. Clark allegedly told Prather a day or so later that he and Hardin had "got rid of" the items. Ultimately, only one of the cell phones was recovered. Prather was questioned and explained about Clark's involvement, although at trial, he stated he did not see Clark at the scene. Jackson initially blamed Clark completely for the burglary but later admitted that he and Prather committed the burglary and that Hardin and Clark only came later. Hardin also testified, pursuant to a plea agreement, that Clark had borrowed the truck but claimed Clark "was not present during the pickup of the stolen items."

Clark was indicted for Complicity to commit the Burglary, the Theft and Unlawful Transaction with a Minor.[1] He was convicted of the burglary and theft and appealed.

ISSUE: Does evidence of involvement after a crime infer proof of complicity?

HOLDING: Yes

DISCUSSION: Clark contended there was insufficient proof that he was complicit in the burglary. Looking to KRS 502.020, the Court noted the elements for accomplice liability, which requires that Clark intended that Prather and Jackson commit the burglary.[2] Clark argued that the burglary was completed before he ever arrived. The Commonwealth countered that "intent can be inferred from the evidence and the surrounding circumstances."[3] The Court noted that Clark apparently disposed of the items and it was reasonable for the jury to infer that he was involved before the crime. (The Court also agreed that there was sufficient evidence that the items stolen were worth more than $500.)

Clark's conviction was affirmed.

Carpenter v. Com., Ky. App. 2013

FACTS: On July 9, 2010, Det. Mirus (Rowan County SO) asked a CI (Clevenger) to do a controlled buy from Carpenter. Det. Mirus had used Clevenger in the past and

[1] One of the thieves was under 18.
[2] Tharp v. Com., 40 S.W.3d 356 (Ky. 2000); Thompkins v. Com., 54 S.W.3d 147 (Ky. 2001).
[3] Dillingham v. Com., 995 S.W.2d 377 (Ky. 1999).

found him to be reliable. Clevenger was a paid CI rather than one working off a crime. Det. Mirus picked up Clevenger and drove him to the Morehead State University campus where he searched him, provided him with cash and fitted him with a recording device. He dropped Clevenger off near Carpenter's home. Clevenger returned shortly with 20 hydrocodone pills in a wrapper.

Carpenter was indicted for trafficking as well as complicity to traffick. His wife was also charged. At trial, Clevenger testified that when he asked Carpenter about pills, Carpenter stated he didn't have any pills but his wife did. He was taken to meet with her and ultimately was sold the pills. A recording corroborated that testimony.

Carpenter's wife took a plea to trafficking and testified against her husband. Carpenter was convicted of complicity to traffick and appealed.

ISSUE: Does directing a buyer to someone who can sell them illegal drugs constitute complicity?

HOLDING: Yes

DISCUSSION: The Court looked to KRS 502.020 and agreed that there was adequate evidence that Carpenter was complicit with his wife in trafficking. The Court upheld Carpenter's conviction.

PENAL CODE – KRS 508 – WANTON ENDANGERMENT

Coleman v. Com., 2013 WL 399132 (Ky. 2013)

FACTS: The night before Thanksgiving, Coleman and his wife went to a Louisville grocery store. They arrived in a Buick Century. Coleman tried to buy a money order from Rivers, at the service desk, but didn't have enough cash. The couple left. A few hours later, Coleman arrived alone, apparently in the same vehicle, and went to the service desk. Rivers came over and recognized Coleman. Coleman pulled a gun and fired a single shot that grazed Rivers, and then ran. Officer Clarkson (Louisville Metro) was working at the store and he immediately secured the scene, finding a .25 shell casings and a bullet fragment projectile in the area.

Coleman was identified by his wife's use of her Kroger savings card during his earlier visit – it belonged to her daughter. The daughter identified her mother and Coleman from surveillance tapes although she later denied having identified Coleman. The officers got a search warrant for Coleman's home, finding a .loaded 32 pistol and an almost full box of .25 ammunition.

Rivers later identified Coleman from a photopak and also identified him in Court. Coleman was convicted of Murder – Attempt and Wanton Endangerment 1st. (It is not clear why he was not charged with Robbery.) Coleman appealed.

ISSUE: Must there be some indication of potential victims in a Wanton Endangerment charge?

HOLDING: Yes

DISCUSSION: Coleman argued that he should have been acquitted of the Wanton Endangerment charge because no particular person was identified who was endangered when he fired the shot. (There was no one else in the immediate vicinity, apparently, at the time.) The Court, however, noted that by his own testimony, there were many other people in the store, several of whom entered with him. He fired the shot within seconds of entering and it was certainly reasonable for the jury to find the other customers might still be close to him at the time. The Court agreed that "shooting a gun in an occupied building is the classic example of conduct constituting wanton endangerment.[4]" The Court found it sufficient that there was proof that there were other customers in the store at the time. That was further emphasized by the finding of a bullet fragment some distance from the target, Rivers.[5]

The Court excluded testimony by Officer Clarkson as to the possible trajectory of the bullet, as he was not qualified as an expert. Although the Court did sustain the objection, after Clarkson made a statement to that effect, it did not admonish the jury about it. The Court agreed it was common knowledge that bullets ricochet and the exact trajectory wasn't critical anyway.

Coleman had requested suppression of the photopak identification, arguing that the other photos "were dissimilar in age, eye color, hair style, and facial hair." Using the process in Neil v. Biggers,[6] the trial court had concluded that the photopak "was not unduly suggestive and correctly ended the analysis at that point." The Court noted that since the actual photos were not included (only poor quality black and white photocopies were provided), it could only conclude that the trial court made the correct decision in admitting the photopak.

Coleman's conviction was affirmed.

PENAL CODE – KRS 508 - CRIMINAL ABUSE

Peacher v. Com., 391 S.W.3d 821 (Ky. 2013)

FACTS: On August 25, 2008, Janet and Jeannette Allen were ordered to clean up their Louisville home, which was in "deplorable condition." They were ordered to provide alternative housing for their two toddler children, half-brothers - Wyatt and Chris. Nereida Allen, their sister, agreed to take the two children and she and her boyfriend picked them up that day. On August 27, EMS responded to the couple's home, finding Chris unconscious and in full cardiac arrest. He was transported to the

[4] Port v. Com., 906 S.W.2d 327 (Ky. 1995).
[5] Combs v. Com., 652 S.W.2d 859 (Ky. 1983); Swan v. Com., 384 S.W.3d 77 (Ky. 2012).
[6] 409 U.S. 188 (1972).

hospital and found to have suffered severe head injuries that left him brain dead, along with severe abdominal injuries, with almost all abdominal organs showing extensive injury. He was removed from life support the next day and died. The child also had extensive bruising, "literally from head to foot." The forensic child abuse pediatrician testified that such bruising usually indicated the child had been "violently shaken." Although it was difficult to tell when the injuries were sustained, she thought it likely that some of them had been inflicted in the 18 hours before his death. The medical examiner and neuro-pathologist indicated that all of the serious injuries occurred in the 48 hour prior to his death, with the brain injuries, specifically, having occurred within a few hours of his arrival at the hospital.

Peacher and Allen were questioned by the police at the hospital, who arrived because of the reports of abuse. Multiple interviews were done, separately, of each, and in both, "the detectives became more accusatory as the interviews progressed, and in both cases the defendants' stories evolved from essentially blanket denials of any wrongdoing to admissions of having been rough with Christopher in the course of trying to discipline him. Initially, Peacher stated he had the injuries when he arrived, but when confronted, he could provide no explanation. He claimed the child had been lethargic and nauseous earlier that day and gradually admitted to more physical contact. Allen also stated that he was "heavily bruised" when he arrived and described him as a discipline problem. Both stated he refused food and had vomited. Eventually, she called 911 when he collapsed. When Allen was told she was under arrest, she became tearful and admitted that he had fallen and she had "jerked him up" multiple times.

The child-abuse pediatrician also examined Wyatt as well, finding him to also be somewhat bruised, but not nearly so badly. He also had round "cigarette" burns on his legs and unusual bruising on the ears. Eventually, both Peacher and Allen blamed the other.

Peacher and Allen were charged and tried jointly. Both were convicted of murder, Assault 1st and Criminal Abuse 1st. They were also convicted of abuse of the other, surviving child. Peacher appealed. (Allen's appeal was separate.)

ISSUE: May statements made while not in custody be admitted?

HOLDING: Yes

DISCUSSION: Peacher raised a number of arguments in his appeal. First, the Court agreed that in a joint trial, "the Confrontation Clause ban applies even to hearsay statements offered as evidence against the co-defendant declarant himself, if the declarant does not testify and if the statement either expressly or by immediate implication tends to incriminate another defendant."[7] However, in Richardson v. Marsh, the Court had "explained that the Confrontation Clause does not rule out joint trials or the use at joint trials of non-testifying defendants' out-of-court statements or confessions, provided that the statements are redacted so as to remove express or immediately obvious inferential references to defendants other than the confessor, and

[7] Bruton v. U.S., 391 U.S. 123 (1968); Gray v. Maryland, 523 U.S. 185 (1998).

provided that the jury is admonished to consider the statements as evidence against the confessor alone."[8] In this case, the Court noted that the prosecution "redacted Allen's and Peacher's recorded statements so as to eliminate any reference either one made to the other" – "in such a way that the redactions were not at all apparent." Allen's redacted statement implicated her in the child's condition, alone, although coupled with medical testimony, Peacher was also potentially implicated. The Court noted that even if it was possible that the other party might be "inferentially incriminated," the other defendant's properly redacted statement could be admitted with proper jury admonition.

The Court agreed that a complicity charge was also appropriate, as there was evidence of a joint undertaking that resulted in the abuse.

Peacher also argued that his motion to suppress the statements he made to the detectives should have been suppressed. Peacher argued that he should have been advised of his Miranda rights, but the trial court ruled he was not in custody during the first three segments. By the fourth interview, he was in custody and was given Miranda, which he duly waived. The Court looked to Howes v. Fields and noted that to determine custody, the Court must look at "the place, time, and duration of the questioning; the questioning's tenor, whether cordial and neutral or harsh and accusatory; the individual's statements; the presence or absence of physical restraints; whether there was a threatening presence of several officers and a display of weapons or physical force; and the extent to which the questioner sought the individual's cooperation or otherwise informed him that he was not under arrest and was free to leave." Peacher argued that he was not free to leave since he was taken from the hospital to the police station, in a police vehicle, "he was kept there for nearly four hours and was questioned three times before he was Mirandized; the interviews were recorded; he was told that his house and his car would be searched and that his phone records would be subpoenaed; during the second interview the detective took his cell phones and read the text messages recorded on them; during the third interview the questioning became more accusatory, and the detective asked him what he had in his pockets, searched his wallet, and had him photographed." The detectives stated that both agreed to go to the station and that Peacher rode as a passenger in the front seat.

The Court agreed Peacher was clearly interrogated, but noted, that wasn't the question. "Custody does not materialize, moreover, merely because an interviewee admits to something potentially incriminating."[9] He was interviewed in an open office area and was free to move about and allowed to watch television in another room. He was told several times he was not under arrest.

Peacher and Allen's convictions were affirmed.

Acosta v. Com., 391 S.W.3d 809 (Ky. 2013)

FACTS: Alvarado, six months old, died in 2005. Shortly before her death, her mother, Acosta moved in with Rankin in Kentucky. Rankin watched her children while

[8] 481 U.S. 200 (1987).
[9] Emerson v. Com , 230 S.W.3d 563 (Ky.2007).

she was at work. Alvarado's medical records prior to that time were normal. In mid-July, right after the move, they were allegedly in a crash, although no police report was located under Acosta's name. That was reportedly because Acosta lied about who was driving. There was no record of a medical visit for the child as a result of the crash. Shortly before a scheduled six month doctor's visit, Rankin told Acosta the baby had fallen off the bed and a few days later, Acosta noticed a "soft spot" on the baby's head. Rankin's mother told the couple that the baby was acting as if she was hurting, and also later testified that she had a fever. Acosta had told her about the "jelly spot," a "painful-looking soft knot on the back of the head." Goodlet, Rankin's sister, asked Acosta why she hadn't taken the baby to the doctor; Acosta said she was afraid a cigarette burn and another bruise would trigger a call to social services. Under pressure and a threat that Goodlet would call social services, Acosta finally took the child to the doctor. Another witness testified that the child appeared to be in pain and that he was reluctant to hold her. The witness to the car crash indicated the child was kept in a car seat "twenty four seven" and could not hold a bottle.

At the appointment on August 18, a nurse practitioner noted several troubling issues, but saw no evidence of bone fractures, although in fact, the child did have a fractured arm. She did not report the child to Social Services. On August 22, Rankin was watching the baby. He took M.A. (the 2-year-old) and Alvarado to his parents' home. He left briefly and allegedly returned to find that M.A. had pulled the baby out of the car seat and had his knees on the baby's neck. Rankin found her limp and he rushed out to his parents, outside; they called 911. She was pulseless and not breathing when EMS arrived. The ER doctor reported "evolving" bruising that "looked like handprints" on her neck. She was ultimately pronounced dead.

The autopsy revealed a fractured skull and multiple subdural and epidural bleeding. There were other bruises, contusions and facial injuries consistent from being thrown or swung against an object. The autopsy revealed pre-existing injuries as well, including multiple arm, leg and rib fractures, a dislocated shoulder and round burns on her legs. The injuries most likely occurred within the few months prior to her death.

As a result of the autopsy, her mother, Acosta, and Acosta's boyfriend, Rankin, were charged. Experts testified about the noticeable aspects of the injuries. Acosta's expert noted that if the medical practitioner, who did the exam five days before, didn't notice the injuries, it was unlikely a lay person, Acosta, would have. Rankin was convicted of Murder and Abuse, Acosta was convicted only of Abuse 1st; she appealed. The Court of Appeals affirmed, and she further appealed.

ISSUE: May a Child Abuse charge be upheld even if the defendant cannot be shown to have directly caused the abuse?

HOLDING: Yes

DISCUSSION: The Court had presented the Criminal Abuse charge to the Acosta jury under two theories, the jury found Acosta to have intentionally abused the child, as opposed to having intentionally allowed Rankin to do so. The Court agreed that there was no real proof as to who committed the actual abuse, but that it was reasonable to

infer that Acosta committed at least one abusive act. Upon appeal to the Kentucky Supreme Court, Acosta argued that there was insufficient proof that she committed any direct abuse. The Court looked to the statute and noted that the first element could be shown either with evidence of direct intentional abuse – or with evidence that the Acosta permitted another person of whom she had actual custody be be abused.

The Court agreed that the proof that she permitted abuse was stronger than that she committed the abuse directly, but ruled that it was sufficient to support the conviction. However, the Court agreed that the instruction was flawed but noted that Acosta did not properly object to the giving of the instruction. But, the Court noted, there was no proof that Acosta was present or observed any abuse.

The Court reversed the conviction but ruled that she could be retried under the alternative theory of permitting the abuse.

PENAL CODE – KRS 511 – BURGLARY

Lewis v. Com., 392 S.W.3d 917 (Ky. 2013)

FACTS: On January 3, 2006, Lewis entered a Louisville pharmacy. The staff became suspicious and the police were called. Lewis approached the pharmacy, requesting Oxycontin and another drug. He agreed he had no prescription but announced instead that he had a gun. The pharmacist proceeded to get the medications. Meanwhile the police arrived and arrested Lewis. They found a knife but no gun. Lewis was found to be "highly impaired" and claimed he thought he was filling a valid prescription.

Lewis was acquitted of Robbery but convicted of Burglary. Lewis appealed.

ISSUE: Must a burglary charge in a public building be shown to have involved an unwelcome act?

HOLDING: Yes

DISCUSSION: Lewis argued that the Commonwealth failed to prove that he remained unlawfully in the pharmacy for the purposes of burglary. The Court looked to KRS 511.090. The Court agreed that there is a presumption that "one who enters and remains in a building that is open to the public has a license or privilege to be there." It is not burglary until the individual "knowingly defies a lawful order." That order does not need to be verbal, however. The Court looked to Bowling v. Com.[10] that held the license to remain was "implicitly revoked 'once the person commits an act inconsistent with the purposes of the business.'" However, the Court found that language to be obiter dictum (dicta), and that Lewis's license to be in the pharmacy was never "explicitly or implicitly revoked." In fact, the Court noted, the pharmacy staff "actually took steps to engage [Lewis] in business with the intention of keeping him there until police arrived."

[10] 942 S.W.2d 293 (Ky. 1997).

The court reversed Lewis's conviction for Burglary.

PENAL CODE – KRS 513 - ARSON

Thomas v. Com., 2012 WL 5289393 (Ky. 2013)

FACTS: Thomas and his girlfriend were removed from their room at a rooming house by the landlord, who relocated them to another house. The next day, they were forcibly ejected from that location as well. The police responded and Thomas went to his brother's apartment. He remained there, drinking, until the next day, "when, over the span of about five hours," he set fire to four of the landlord's rooming houses. In the first fire, firefighters found smoldering clothing outside, with the evidence suggesting the clothing had been set afire inside and then dragged outside by another resident, who witnessed Thomas enter. Thomas admitted he set the fire by lighting some paper. At the second fire, he set the vinyl siding afire, causing an evacuation of the premises in the early morning hours. At the third fire, firefighters found an active fire on the first floor that had reached the second floor, at about 5 a.m. Fortunately, the building was unoccupied. Thomas admitted he was angry that his belongings had been removed and stated he lit a candle, pulled the tablecloth from underneath, and left. The fourth fire was at the landlord's home and Thomas tried to start a fire by lighting pieces of paper and stuffing them under the windows and doors. A witness later identified Thomas but the fire department was not summoned.

Thomas was convicted; he confessed to starting the fires. He was ultimately convicted of varying degrees of Arson for the different fires, along with related charges. He appealed.

ISSUE: Is Arson 3rd a lesser-included-offense of Arson 2nd?

HOLDING: Yes

DISCUSSION: Thomas argued that the jury instructions were flawed and that, for example, the jury should have been instructed on all degrees of Arson. He argued that he was entitled to instructions on lesser-included offenses, under KRS 505.020(2). He argued that in the case of one of the houses, it could be found that he "did not intend to damage or destroy the building." The difference between Arson 2nd and Arson 3d is the mental state, intentional versus wanton. He specifically stated that when he pulled the tablecloth, he "did not care" if it started a fire. The Court agreed that the failure to give a necessary lesser-included offense is not harmless, and as such, the Court reversed that conviction.

The Court found it was not improper, however, not to instruct on the crime of criminal mischief, as that is not a lesser included offense of arson. He was also not entitled to a voluntary intoxication instruction, KRS 501.080(1), as there was no proof that he was anything more than drunk and no proof that he did not know what he was doing. Simply

being intoxicated is not enough. Specifically, it requires a "more advanced degree of drunkenness."[11]

The Court affirmed all of Thomas's convictions except the single Arson 2nd charge, which was reversed and remanded.

PENAL CODE - KRS 514 - THEFT

Toogood v. Com., 2013 WL 1188056 (Ky. 2013)

FACTS: On September 19, 2010, Beausejour took Williams for a ride on his new moped. Noticing a problem, they pulled into a gas station. Toogood approached and told them he could fix it. They exchanged numbers. Later that day, they agreed to meet in an alley. There, Toogood pointed a gun at Beausejour and demanded the moped. Beausejour tossed the keys at Toogood and both he and Williams ran. They immediately called 911. Louisville Metro officers responded and spotted Toogood. They chased him, and he was captured. Officers found marijuana in his pocket and a loaded revolver nearby. Toogood was heard to threaten witnesses.

Toogood told a completely different story, claiming that he was simply test driving the moped when spotted. However, he was convicted of Robbery and related charges. He appealed.

ISSUE: Is Theft a lesser-included-offense of Robbery?

HOLDING: No

DISCUSSION: Toogood argued that he was entitled to jury instructions on lesser-included offenses, specifically unauthorized use of a vehicle and theft by unlawful taking. The Court looked at both charges, noting that a theft instruction requires evidence that Toogood took the moped unlawfully but without any threat of force. Toogood, on the contrary, had testified he had it lawfully for a test drive. With respect to unauthorized use, The Court noted that would require a showing that Toogood knowingly used the moped without consent, but that he intended to return it. Again, the evidence did not indicate that to be the case

The Court also looked at the use of the 911 recording. The trial court had admitted it as an excited utterance (KRE 803(2)). Given that the call was made only seconds after Beausejour was held at gunpoint, he had "little time for reflection or deliberation." They were clearly made under stress. The operator's questions were short and not suggestive. The Court further agreed that it was not prejudicial as cumulative and did not improperly bolster Beausejour's testimony. The statements were not testimonial, either[12]

Finally, with respect to testimony provided by Officer Johnson and Officer Furman, both stated that they heard Toogood threaten to kill his victims. Both officers were asked if

[11] Foster v. Com., 827 S.W.2d 670 (Ky. 1991).
[12] Davis v. Washingon, 547 U.S. 813 (2006).

they felt the threat was credible but only Officer Furman's response drew an objection. He was allowed to answer and agreed that they were. The Court agreed that their statements regarding credibility were irrelevant to the charge, which doesn't require any indication that the threat was actually going to be carried out. Their testimony was inadmissible but the Court agreed it was only marginally prejudicial and could have been cured by an admonition, rather than the mistrial requested and denied.

The Court upheld Toogood's conviction.

Allen v. Com., 395 S.W.3d 451 (Ky. 2013)

FACTS: In 2004/2005, Allen, a Louisville Metro PD officer, had a "short romantic relationship" with Weaver. During that time, he bought a pickup truck and financed it. Needing a co-signer, documents were produced showing Allen's name, but she later denied that she signed the documents, claiming they were forged. Weaver made payments on the truck until he was injured. As a result, the truck was repossessed for non-payment.

In 2006, Allen swore out a complaint that Weaver had forged her signature. The finance company, concluding she had been a fraud victim, forgave the debt to Allen. Weaver, when arrested, however, convinced the prosecutor that she had, in fact signed the documents and the case was dismissed. In 2008, they got into an altercation and Weaver claimed Allen threatened his life.

As a result, Allen was investigated by LMPD's Public Integrity Unit. Her story had inconsistencies, however, and as a result, she was charged with Perjury 1st, Theft by Deception and Terroristic Threatening. Allen was convicted of all but the last charge and appealed. The Kentucky Court of Appeals affirmed and she further appealed.

ISSUE: May a cosignor on a debt which is discharged be criminally liable?

HOLDING: Yes

DISCUSSION: The Court looked first to the Theft charge. Allen claimed that she obtained no property or services, in that the finance company did not rely on her "allegedly false representation." The Court looked to KRS 514.040, Theft By Deception, and noted that Allen did not challenge that she deceived Toyota. (Even though Weaver remained the primary obligor on the debt, there was no guarantee that the finance company would be able to recover from him.) The Court noted that it is clear that the legislature, by listing a number of items as covered "property" under the Theft statutes, intended to cover a broad range of possibilities, including intangible property. Prior to the discharge, the finance company had contract rights that could be enforced against Allen and by discharging the debt, they lost that thing of value. She obtained that discharge by deceit, which is the epitome of Theft by Deception. (Even though it was possible the finance company might seek to reestablish the debt, at the time of the conviction, they had not yet done so.)

Although not part of this summary, because Allen was not permitted to question Weaver on the stand about his prior criminal history, the Court reversed her conviction.

Tanner v. Com., 2013 WL 658123 (Ky. 2013)

FACTS: In January, 2008, Tanner was on parole and living at a drug halfway house. He met Pierce through a singles phone service and a few weeks later, they met in person. He lied about his job situation and where he lived – claiming to live and work in Indianapolis.. Since Tanner lacked a car, she would pick him up and then later drop him off at a house in Louisville. He began spending overnights with her. In late May, he told her he was quitting his job and moving to Louisville. Unable to find rental property, he moved in with Pierce and her son, Aaron, age 19. Over the months, she gave him a great deal of money for various claimed needs. (Tanner had a bank account, but it was closed during the time frame for insufficient funds.) Despite it being closed, he wrote Aaron two checks from it, for cash, claiming to want to buy Pierce a gift. He also wrote Pierce several checks, totaling over $3,000, which also bounced.

Becoming suspicious, Pierce opened another bank account, since Tanner had access to her primary one. He discovered the ATM card and PIN and started using it. She initiated a complaint and he was arrested. Checks on her accounts and her ATM card were found in his wallet. Several were falsely signed with her name.

Tanner was indicted on multiple counts of Theft by Deception, Theft by Unlawful Taking, Fraudulent Use of a Credit Card, Criminal Possession of a Forged Instrument, and PFO. Because the law changed subsequent to the crime, Tanner asked to apply the new (at the time) threshold for theft, $500. Since most of the checks individually were less than that amount, they were amended to misdemeanors. However, remaining offenses were felonies.

Ultimately, Tanner was convicted of misdemeanor TBUT for checks written to Pierce and felonies for forged checks, as well as PFO. Tanner appealed.

ISSUE: Are checks written on a closed account considered Theft?

HOLDING: Yes

DISCUSSION: The Theft by Deception convictions were for the checks given to Aaron Pierce, in exchange for cash. Tanner argued that the checks were for a loan, and that he told Pierce to hold the checks until he'd gotten paid. However, the Court noted that he had to be aware that the account was closed, not just depleted. Further, Pierce handed over cash in exchange for the checks and Tanner lied to Pierce about what the money was for, indicating deception. The Court upheld his conviction on those charges.

With respect to the Criminal Possession of a Forged Instrument charges (KRS 516.060), Tanner argued that while he'd signed Pierce's name, none had a payee listed and only one included an amount. A witness testified that he had been offered a signed check to satisfy a loan and the Court agreed that was sufficient to prove he attempted to defraud someone with a forged check, even though the checks were legally "incomplete."

Further, he objected to the introduction of his own bank records, which showed the attempted cashing of the checks on a closed and empty account. He complained such evidence showed him to be financially irresponsible and was improper under KRE 404(b). The Court ruled that the evidence was properly admitted and was relevant to show a "lack of mistake or accident."

The court also agreed it was appropriate to prove that he lied to Pierce about his situation and where he lived, although the evidence was carefully tailored so as not to reveal he was actually on supervision. The Court agreed this showed a plan and intent to deceive the Pierces.

Tanner's convictions were affirmed.

DRIVING UNDER THE INFLUENCE

Carroll v. Com., 2013 WL 139461 (Ky. App. 2013)

FACTS: On April 14, 2010, Carroll was arrested in Mercer County by Chief Caldwell (Bergin City) for DUI. She moved for suppression, alleging he lacked probable cause for the arrest. She also alleged that he did not properly observe her for 20 minutes prior to the breath test, as required by KRS 189A.103 or advise her of her rights under 189A.105.

Chief Caldwell testified that he did do so and that she tested .255. Since the jail would not take a prisoner over .25, he waited a short time and retested her. He did not give her the warnings a second time. As she tested .259, he took her to the hospital and a blood test was given; no implied consent warnings were read at the hospital. That test showed her BAC was .32. The Chief stated that he did not plan to use the second and third test in criminal charging, but were taken for medical purposes only.

The Court overruled the motion. Carroll took a conditional guilty plea and appealed.

ISSUE: Are warnings required for a blood alcohol test being taken for medical purposes?

HOLDING: No

DISCUSSION: Carroll argued that in the first test, Chief Caldwell did not observe her continuously. The Chief stated that he did, and that when he went into the room with the Intoxilyzer, he took her with him.

With respect to the implied consent warnings, the Court agreed that any errors with the second and third test did not require the first test – in which the warnings were given – be suppressed. Since the tests were not going to be introduced, the issue was moot.

Carroll's conviction was affirmed.

SEARCH & SEIZURE – CONSENT

Eddings v. Com., 2013 WL 53880 (Ky. App. 2013)

FACTS: On February 12, 2011, Eddings was in a cemetery in Muhlenberg County with a female passenger. Constable Albro was on a routine patrol of the area and came across the vehicle. He called for backup and Deputy Albro (his nephew) responded. Before the deputy arrived, though, Constable Albro asked for ID from Eddings, getting only his SSN. The female produced an OL. Deputy Albro arrived and had Eddings get out of the vehicle and come to the back of the car. At the rear of the vehicle, the deputy asked Eddings if he had any weapons or other illegal items. Eddings emptied his pockets on request. Deputy Albro asked about a cigarette pack, and "Eddings picked it up, opened the top, and shook it at the officer." He then laid it back on the hood. "Deputy Albro then picked up the pack and looked in it himself" – finding methamphetamine. Deputy Albro frisked Eddings, finding more methamphetamine. Eddings admitted to having marijuana and a pipe as well. The vehicle was searched, and yet another pipe was found.

Eddings was charged with various drug offenses. He moved for suppression, arguing that the initial detention was illegal and that the drugs were as the "fruit of the poisonous tree." The Court agreed that the detention was illegal, but found that Eddings consented to the search. Eddings took a conditional guilty plea and appealed.

ISSUE: Does laying a cigarette pack down constitute consent to search it?

HOLDING: No

DISCUSSION: The Court noted that "[c]onsent to search may – but not necessarily – dissipate the taint of an illegal detention."[13] Consent must be voluntary and the product of Eddings' free will. The Court agreed that the underlying facts were undisputed and the trial court had ruled that the officers' actions, polite, not displaying a weapon, etc., pointed to the consent being voluntary. However, the trial court did not address the issue of free will, and there, the Court disagreed, finding that "even though it does not appear the police officers purposefully intended to illegally detain Eddings, the search of the items in Eddings's pockets flowed immediately from the illegal detention."[14] The Court noted as well, that when "Eddings placed the cigarette pack back on the trunk of the car without giving it to Deputy Albro, this could have reasonably been viewed as a revocation of consent."[15]

The Court vacated the guilty plea and remanded the case.

SEARCH & SEIZURE – PATANE

Goff v. Com., 2013 WL 462084 (Ky. App. 2013)

[13] Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).
[14] Strange v. Com., 269 S.W.3d 847 (Ky. 2008).
[15] Com. v. Fox, 48 S.W.3d 24 (Ky. 2001).

FACTS: Dets. McBride and Ford (Lexington PD) went to Goff's apartment to arrest him for trafficking, without a warrant. Goff admitted them. There was dispute over whether they told him he was under arrest first. Det. McBride agreed Goff was not given Miranda warnings at the time, but he was asked if there were any narcotics at the house. He allegedly consented to a search, although Goff indicated he was "pretty sure" he did not give consent. Marijuana was found.

Goff was convicted and appealed.

ISSUE: Does the failure to give Miranda require suppression of physical evidence found as a result of a statement?

HOLDING: No

DISCUSSION: Goff argued that he did not voluntarily consent to the entry, or the search, of his home. The Court ruled that it considered that "Goff was only informed that he was under arrest after the police had entered his home." Therefore, it was voluntary and not coerced. The Court credited the statement he gave when asked about narcotics ("go ahead and search") when not being specifically asked for consent to search as a "unsolicited response to a unwarned voluntary statement."

The Court looked to U.S. v. Patane.[16] The Court agreed that the failure to give Miranda "does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements because the introduction at trial of physical evidence does not implicate the Self-Incrimination Clause, which Miranda is designed to protect."

The Court upheld the denial of the motion to suppress, and Goff's conviction.

SEARCH & SEIZURE – EXIGENT ENTRY

Collier v. Com., 2013 WL 762360 (Ky. App. 2013)

FACTS: On February 23, 2011, Det. Herndon (Henderson PD) was contacted by a CI that had proved reliable in the past. The CI said they had just left Collier's trailer, where Collier was manufacturing methamphetamine. Dets. Herndon and Ramsey went to the location at about 10:30 a.m. They found a power cord running from Collier's trailer to the one on the next lot, and Det. Herndon also "detected a chemical odor" he knew to be associated with methamphetamine labs. They spoke to the occupant of the next trailer and then approached Collier's trailer. No one responded to the knock, but they found an open window and a stronger chemical odor. When they still got no response, Det. Herndon, who was knowledgeable about labs, elected to pry open the front door.

Inside, they found Schini lying on the floor in a "submissive position." They also saw, in plain view, a number of items relating to manufacturing. They found Collier in the bathroom. During a search, they finally located two separate labs, under the floor on

[16] 542 U.S. 630 (2004).

the ground, which was reached through two trap openings. They "proceeded to dismantle and clean up" the lab.

Collier was charged and moved for suppression, arguing the entry was unlawful. The trial court disagreed, finding the entry justified by exigent circumstances, recognizing that "the manufacture of methamphetamine is inherently dangerous and can create situations where there is a risk of harm.to the police and others." In particular, the Court noted the proximity of other trailers.

Collier took a conditional guilty plea and appealed.

ISSUE: Does a strong chemical odor provide an exigent circumstance to search?

HOLDING: Yes

DISCUSSION: The court reviewed each objection made by Collier. The Court agreed that although Det. Herndon could not identify the odor specifically, it was enough that he described it as a "strong chemical smell" emanating from a location already believed to be an active lab. Further, it was appropriate for him to investigate the trap door in the floor, given those same suspicions.

Collier argued that Herndon entered only to find incriminating evidence, rather than to protect public safety, because he kept Schini and Collier inside the trailer during the search, and took no action to keep the other residents of the park safe. Det. Herndon, however, had testified that some types of labs are more dangerous than others, and that he believed it was safe to remain once he actually located the lab. (The Court noted, as well, that they had to enter to get Collier and Schini anyway.) Although the lab[17] was not in plain sight, there was sufficient evidence of manufacturing visible when the detectives entered to rule that an arrest was appropriate before the lab was found.

The Court affirmed Collier's plea.

<u>Rogers v. Com.</u>, 2013 WL 275589 (Ky. App. 2013)

FACTS: On February 20, 2009, Rogers' trailer in Clay County was searched by local authorities The officers did not have a warrant, but entered an "enclosed shed that was attached to the rear of the trailer." They apparently entered in response to the odor they recognized as associated with methamphetamine production. They were unable to get a response at the trailer itself, although ultimately, they went into the trailer. (They had prior knowledge that the occupants had been involved in methamphetamine production previously and that children resided at the location.)

[17] Det. Herndon used the term "meth oil" to describe what he found, and the Court, in a footnote, indicated it did not know what that was, as it was not explained during testimony. In fact, it is the stage of methamphetamine production prior to the final, powder stage.

Once they entered, they found Rogers and his wife inside, and Rogers gave consent to search.

Rogers was convicted and appealed.

ISSUE: Does a strong chemical odor justify entry into a building?

HOLDING: Yes

DISCUSSION: The Court found itself in an unusual position, as during the process it discovered that the suppression hearing had not been properly recorded. The record was rebuilt from the recollections of those present. Rogers argued that the affidavits of the Sheriff and the two deputies of the scene suggested that they entered the shed prior to any of them noting the incriminating odor, but the Court ruled that did not appear to th be the case. Instead, it agreed that one deputy had approached the shed and smelled the odor while the others initially approached the trailer.

The Court agreed there was sufficient exigent circumstances to support their entry into the shed and upheld his convictions.

SEARCH & SEIZURE – PLAIN VIEW

Mayes v. Com., 2013 WL 557276 (Ky. App. 2013)

FACTS: On the day in question, Lexington PD received a complaint about drug trafficking at a specific house. They approached and found a woman (Regina Mayes) standing in the doorway of the residence. She agreed she lived there and consented to allow the three officers into the living room. As they spoke, Officer Thomas saw an open tin can on the coffee table; it contained marijuana. The officer later explained that he could see the marijuana and that gave them sufficient information to apply for a search warrant. Mayes was also given her Miranda warnings. She consented to a search. One of the officers later testified in the suppression hearing that he saw a blunt (a hollowed out cigar) on the table as well. Mayes was eventually cited, rather than arrested, because she had children in the house. Officer Thomas testified that the photos, which showed the tin with the lid on, was because it had been prepared to be collected into evidence.

Mayes testified that the lid was on the can and that they could not have seen what it contained. The Court declined to suppress the evidence. Mayes took a conditional guilty plea to trafficking and possession and appealed.

ISSUE: Is it critical to prove all elements of plain view to uphold a search?

HOLDING: Yes

DISCUSSION: Mayes pointed out an unusual situation, that the Court made a misstatement in its ruling that went uncorrected. The Court's written ruling indicated that there was "insufficient evidence" … "to establish that the lid was off the tin." The Court was forced to agree with Mayes that the "marijuana could not be identified in the closed tin without additional investigation on the part of the officers." As such, the Court ruled that the Commonwealth had not met its burden to establish plain view, as the "incriminating character of the tin was not immediately apparent because the lid hid its contents."

The Court reversed the decision of the Fayette Circuit Court and remanded the case.

SEARCH & SEIZURE – CURTILAGE

Com. v. Ousley, 393 S.W.3d 15 (Ky. 2013)

FACTS: Ousley lived in a townhouse in Lexington. The townhomes were close together, separated only by driveways. The homes were staggered to create some degree of privacy. A person approaching the front door would walk down the driveway to the short walk that led to the door. Ousley, specifically, had a small storage shed sitting on the driveway some distance back from the front of the house. The trash cans "were usually placed on the left side of the driveway almost touching the siding of the house on the left and somewhere between the storage shed and the front plane of Ousley's house."

In 2009, Lexington police got a tip that Ousley was selling methamphetamine from his home. Det. Ford investigated and did surveillance on the residence. As a "last resort" he did a trash pull, in which in two instances, "he walked onto the property late at night and took trash bags from the closed outdoor trash cans." He found incriminating evidence and obtained a search warrant. Upon executing it, the police found methamphetamine, marijuana, digital scales and other items.

Ousley was indicted for Trafficking 1st and additional charges. He moved for suppression of the trash pull evidence. The trial court concluded they were lawful, based on the location of the cans. Det. Ford indicated that the cans were between the car parked in the driveway and the storage shed, and were 'even" with the front of the house. The trash cans were city-issued items and were not placed in either instance where pickup would occur. Ousley testified that he kept the cans near the shed, as required by the homeowners' association, but that at the time the pulls were done, apparently he had mulch sitting where the cans were normally be located. He disputed that they were between the car and the house next door, stating that the driveway was too narrow. The trial court apparently essentially adopted Det. Ford's descriptions.

The trial court assessed the question as to whether the trial court was within the protected curtilage of the house. It looked to U.S. v. Dunn[18] and noted that the cans

[18] 480 U.S. 294 (1987),see also Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).

were very close to the house, not in an enclosed area and were in an area open to and visible from the street. The Court ruled that they were not in the curtilage and denied the suppression.

Ousley took a conditional guilty plea and appealed. The Court of Appeals ruled that under California v. Greenwood[19] the cans were within the curtilage and reversed. Specifically, it noted that "given the configuration of the homes in Ousley's neighborhood and the realities of modern urban living," it could not be said that the general public would feel free to enter the area and rummage through the trash. The Commonwealth appealed.

ISSUE: Is the precise location of an item critical for a curtilage assessment?

HOLDING: Yes

DISCUSSION: The Court noted that the fact that "the trash was in a closed trash can is not the gravamen of this decision," everyone agreed the trash cans were closed. However, in Greenwood, the cans were out at the pickup location. In this case, however, the cans were still located on the protected curtilage. Even though the trial court and the appellate court differed on their decision as to where the cans were located, the court agreed that Greenwood is dispositive. Greenwood noted that cans put out for public access would be where it would be intended to be picked up, and "established parameters defining where Fourth Amendment protection of the house or effects stops – the public domain." The only relevant question, however, is whether the cans were on the curtilage, whether the trash is considered "abandoned" is not relevant. Also using the Dunn factors - (1) whether the area is included in an enclosure with the home, (2) whether the resident has taken steps to prevent observation from the people passing by, (3) how the area is used, and (4) the proximity of the area to the home – the Court agreed that homes in urban areas do not lend themselves to enclosures. Fencing is convenient, but not necessary, to show that an area is intimately tied to the house and few people completely barricade their homes and yards from sight. The trash cans were closed and opaque and as such, the trash was not open for observation. The area was used for personal activities, parking the car, home storage, yard work, etc. The Court found proximity to be the most definitive factor, noting that they were at most even with the front of the house and no farther from the house than the width of a narrow driveway.

The court noted that in an urban setting "a larger percentage of private property is curtilage than in rural areas because there is generally a limited amount of land surrounding the house."

The Court agreed that curtilage is not "unassailable" and that the general public may approach the front door. In Quintana, the Court coined the term "invadable" curtilage where that would normally occur. Law enforcement may enter "only to the extent that the public may do so." In this case, the officer's actions clearly indicated he did not

[19] 486 U.S. 35 (1988).

want to interact with the homeowner, a legitimate reason to “invade” the curtilage, but instead he was avoiding it by entering at night.

The Court summarized:

> Law enforcement's right to invade the curtilage without a warrant must be related to actually engaging with the occupants of the residence, just as the public's right of access turns on the intent to engage in ordinary business with the occupants. Thus, the police do not violate the Fourth Amendment when they "utilize normal means of access to and egress from the house, for some legitimate purpose, such as to make inquiries of the occupant or to introduce an undercover agent into the activities occurring there."
>
> And just as a private salesperson—absent no-solicitation signs, no trespass signs, etc.—has implicit permission to approach the house to conduct business with the inhabitants, so too do the police. But just as the salesperson must actually engage or attempt to engage the house, or else be seen as a trespasser, snoop, or peeping tom, so too must the officers actually try to contact the residents, whereupon they may "see or hear or smell from that vantage point."

The Court agreed that the time the invasion occurred is also important and “just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so.”

Finally, although the Court agreed that the items in the can had been “disposed of” in a “very technical sense,” that was not enough. Items remaining on the property retain some privacy aspects, even if characterized as trash. The Court emphasized that “the *location* of a closed container is always a factor that must be considered.” Once the Court affirmed that the cans were in the curtilage, the analysis ended. The officers could simply have waited until the trash was set out for pickup.

The Court affirmed the reversal of his plea.

SEARCH & SEIZURE – TERRY STOP

Allen v. Com., 2013 WL 645990 (Ky. App. 2013)

FACTS: On July 17, 2009, at about 3 a.m., Officer Williams (Lexington PD) noticed a vehicle turning into an area occupied primarily by businesses, closed at that time of day. He followed the vehicle as it turned in behind a dentist’s office. The officer turned on his overhead lights and the suspect vehicle “did a slow U-turn and the passenger [Allen} jumped out of the car and ran.” Officer Williams chased Allen and apprehended him. As soon as backup arrived, Allen was frisked. Officer Williams asked Allen why he ran; Allen said he was the subject of an outstanding warrant. Allen was then arrested and searched. The officer found over $1,000 in cash and asked Allen if he “missed anything.” He was told “it fell down my leg,” but when the officer asked what “it”

was, Allen replied "nothing." (At some point, apparently, he was given his Miranda warnings by the other officer.) A K-9 located a bag containing eight smaller packages of cocaine nearby.

Sgt. Lowe interviewed Allen, after giving him Miranda warnings. He was taken to the hospital for an unrelated reason, and was reinter viewed there less than an hour later. (He was not given Miranda a second time.) He admitted the drugs were his.

At the suppression hearing, Allen argued that the evidence should not have been admitted. The trial court ruled that the officer lacked reasonable and articulable suspicion for the stop of the vehicle, but agreed that the discovery of the warrant "overcomes any taint of an impermissible initial encounter." Further, the evidence was discovered because of Allen's flight, not the arguably impermissible stop. The Court agreed the evidence was admissible. However, the trial court did agreed to suppress the initial statements made to Officer Williams, whom the Court commended for being "extremely truthful when he testified that he was uncertain when Allen was advised of his Miranda rights" by the other officer. It did not suppress the statements made following the Miranda warnings, given at the station and the hospital, however.

Allen took a conditional guilty plea and appealed.

ISSUE: Does fleeing the scene on foot justify a Terry stop?

HOLDING: Yes

DISCUSSION: Allen argued that the officer did not have sufficient cause to make a Terry stop of Allen, following his flight. The Court agreed that the initial attempt to stop, which was unsuccessful, was improper, but ruled that the stop of Allen following his "headlong flight from a moving vehicle in a direction away from" the officer was based on reasonable and articulable suspicion of criminal activity. Allen was not actually seized until he "engaged with Officer Williams on the ground."

With respect to the cocaine evidence, Allen argued that its discovery flowed from the un-Mirandized statement, and thus should be suppressed. The Court looked to Oregon v. Elstad[20] and U.S. v. Patane[21] and agreed that that statement must be excluded, but that the physical evidence found as a result was admissible. Further, the statements made following the proper Miranda warnings was also admissible and that the change of location and brief break did not require re-Mirandizing.

The Court upheld Allen's plea.

[20] 470 U.S. 298 (1985).
[21] 542 U.S. 630 (2004).

SEARCH & SEIZURE – VEHICLE STOP

Kavanaugh v. Com., 2013 WL 645941 (Ky. App. 2013)

FACTS: On December 30, 2010, Officers Walker and Dellacamera (Lexington PD) observed Kavanaugh. Kavanaugh stopped his vehicle near a bar and Lewis approached it. Lewis "surveyed the surrounding area and" got inside the car. The officers believed, due to the location and their observations, that Kavanaugh was trafficking. Officer Kloss, nearby, in a marked car, was contacted, but before he could arrive, Officer Walker observed Kavanaugh make an unsignaled turn. Officer Kloss arrived and observed a "lane change without signaling." He made a traffic stop, joined by the other officers.

Lewis agreed to a search of his person, and $10,000 in cash was recovered. He also had a one way bus ticket from Detroit to Lexington. Officer Walker also observed a pill on the passenger floor board. Kavanaugh said he was a "free-lance undercover narcotics agent" working on a case. He consented to a search and a large quantity of oxycodone was found.

Kavanaugh was indicted for trafficking. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does observation of probable contraband justify a longer detention in a traffic stop?

HOLDING: Yes

DISCUSSION: Kavanaugh argued that his detention was unreasonably prolonged and that they lacked probable cause to "conduct any investigation beyond the actual traffic stop." The Court noted that the observation of the blue pill justified a warrantless search and curtained justified the longer detention.

The court upheld his plea.

Ingram v. Com., 2013 WL 645941 (Ky. App. 2013)

FACTS: On April 2, 2011, Officer Ockerman (UKPD) stopped Ingram's car for its lack of taillights. Ingram did not present an OL, and instead, was discovered to be DUI-suspended and also lack auto insurance. Ingram was arrested.

Ingram was indicted for a driving on DUI-suspended, 3rd offense and related offenses. He requested suppression. Officer Ockerman testified as to what she observed and what she did during the stop. Ingram called Sutton, his girlfriend, who was with him in the car and she testified that at one point, they were told the "lights were working" by an officer. Ingram also called another witness, a family member who arrived and was permitted to drive the car away, apparently at that point the lights were working. (Officer

Ockerman indicated the vehicle was to be towed, but she left the scene with the prisoner, apparently, before the witness was allowed to take the vehicle.) Ingram also testified that he saw that the back lights were working.

The trial court denied Ingram's motion, finding that it was possible they simply weren't working when first spotted. Ingram took a conditional guilty plea and appealed.

ISSUE: Does a minor traffic offense justify a traffic stop?

HOLDING: Yes

DISCUSSION: The issue in this case was the initial investigatory stop of the vehicle. The Court looked to Taylor v. Com.,[22] which held that at least articulable reasonable suspicion is needed for a traffic stop. Officer Ockerman testified in detail that the brake lights were working, but not the taillights. The Court gave no credence to the issue of the vehicle ultimately being driven away, rather than towed, noting it was possible that they were operational at that point.

Ingram's plea was affirmed.

SUSPECT IDENTIFICATION

Carter v. Com., 2013 WL 645941 (Ky. 2013)

FACTS: On January 6, 2010, McDowell and Griffith were robbed at gunpoint in Louisville. Others were in the house and hiding at the time. Money, credit cards and cell phones were stolen. McDowell and Young, the other male occupant of the house, chased the intruders as they left, until they got into a truck and fled. McDowell was the only one able to give a description, as they were wearing masks, which slipped during robbery. The next day, the Keltees (father and daughter) were also victims of a home invasion robbery; they lived only a short distance away from the location of the first robbery. A number of electronics were taken but a hat was left behind.

Carver, Carter's cousin, came to believe that Carter and Jones committed the robberies. She took a photo of Carter to the Keltee home and told him that Carter was the robber.

Det. Crouch (LMPD) was assigned to the case. Carver and Taylor (a relative of Keltee) told him that they suspected Carter and that Keltee had seen a photo of Carter. He prepared two photopaks (for Jones and Carver) and again, Keltee identified Carter. (He indicated he was about 70% sure.). Det. Crouch presented a different photopak to Young and McDowell. Young did not identify anyone, but McDowell also identified Carter positively.

[22] Also see Johnson v. Com., 987 S.W.2d 302 (Ky. 1998).

Carter was indicted on multiple counts of Robbery, Possession of a Handgun by a Convicted Felon and related charges. He moved to split the charges involving the two locations but the trial court denied the request, finding the "robberies were sufficiently related." Carter was convicted of most charges and appealed.

ISSUE: May a witness showing a photo of a suspect to another witness taint a subsequent police identification?

HOLDING: Yes (but see discussion)

DISCUSSION: Carter argued that the identifications should have been suppressed because the Detective knew that Carver had shown Keltee a photo of Carter, and also knew that "the victims from the two robbery locations had communicated among themselves – which was why he made up a second photopak.

The Court looked to the Biggers[23] test, as well as Perry v. New Hampshire.[24] The Court agreed that there was no improper police conduct involved, as the detective had "no part in the interaction between Carter and Keltee." Det. Crouch made an effort to mitigate any suggestive impact of the prior viewing by changing out the photopaks. The Court agreed it was probable that the circumstances were suggestive, but that alone was not enough, as the police did not create the situation. Since that was not the case, it was unnecessary to even use the Biggers factors. The Court upheld the identifications. The Court also agreed it was proper to join the two robberies for trial.

The Court affirmed the denial of the writ of prohibition.

INTERROGATION

Gonzalez v. Com., 2013 WL 1188020 (Ky. 2013)

FACTS: On August 24, 2009, at about 1:30 a.m., Gonzalez when to Smith's home, wanting to speak to her son, Dominique. Demetria, Dominique's sister answered the door, but told Dominique to stay inside, as she thought Gonzalez and his companion had guns. (The companion stayed near the street, at their Mustang.) Smith called the police. Everyone in the house (including three others) went to bed, except for Smith and Demetria, who feared something more was going to happen.

A friend of Gonzalez's, Kinnard, met him in Louisville, and the switched vehicles. Thomas left in her car, with a rifle.[25] About 4:30 a.m., "multiple bullets ripped through … Smith's home, targeted mostly at the front bedroom where Dominique and Lajuan [a friend] were sleeping." Lajuan died from his injuries; both Dominque and Darius [his 14-year-old brother] were badly injured.

[23] Neil v. Biggers, 409 U.S. 188 (1972).
[24] 556 U.S. --- (2012).
[25] At one point the rifle is described as an "assault rifle."

Gonzalez and the other man returned, switched cars and told Kinnard to follow him to an apartment complex. He then returned the rifle to her vehicle, a Taurus, while Kinnard stayed in the Mustang. Gonzalez left briefly and returned in a Concord, and they ultimately drove both vehicles to a nearby motel and checked in. Kinnard returned to Danville the next day, where she lived, apparently leaving the Taurus behind. (She later testified that Gonzalez 'was excited" when he saw the news story about the shooting.)

The police connected Gonzalez to Kinnard and the Taurus and interviewed Kinnard in Danville. They arrested Gonzalez a few days later, after a short chase that occurred after he committed a traffic offense. Gonzalez was charged with Murder, Attempt-Murder, Assault 1st, Wanton Endangerment 1st, Tampering and Fleeing and Evading (for the chase). Gonzalez was convicted and appealed.

ISSUE: Are threats made against a third-party admissible?

HOLDING: No

DISCUSSION: Once Gonzalez was captured for fleeing from the traffic stop, he was questioned by a Louisville police officer. Gonzalez made a number of inflammatory comments about another officer who was not at the scene. The detective 's reasoning for tolerating this line of question is that he knew that Gonzalez and Dominique had an altercation previously that had involved the other officer in some way. Gonzalez moved for suppression of the statements about the officer, arguing that the were "irrelevant and unduly prejudicial." The Commonwealth argued that it was relevant to show his propensity to "commit violent acts, including murder, against someone he had problems with, which went directly to the factual issue before the jury."

The Court noted that initially the interview was appropriate to explore Gonzalez's relationship with Dominique. However, it "quickly devolved into a twenty-minute profanity-laced, maniacal diatribe by [Gonzalez] that was unprompted by the detective and not in response to any questions posted by the interrogating detective." Eventually, he was able to bring the interview "back around to the topic of the shooting." Shortly thereafter, Gonzalez invoked his right to counsel and the interview ended.

The Court agreed that the portion of the interview concerning the officer was clearly inadmissible, as it was irrelevant and served to only "propensity" character evidence under KRE 404(a)[26] The Court had "previously condemned the admission of prior threats made against third-parties."[27] Most of the disputed portions of the recordings regarding the other officer could easily have been excluded from what was played for the jury. However, the Court agreed the evidence against him was strong and as such, the error was harmless. The Court ruled the same with respect to a disputed recording of his discussion about his preference for Glock handguns. The Court had no issue with

[26] "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."
[27] Davis v. Com., 147 S.W.3d 709 (Ky. 2004)

the introduction of evidence of prior arguments and disputes with Dominique, to show Gonzalez's "motive and intent."

Evidence of prior traffic stops, when he was driving each of the vehicles in question, was probative that he was "known to drive" them even though he did not own them. Also at trial, Det. Cohn was called to testify about how Gonzalez was identified as the suspect. He testified to how a particular Taurus was seen to be leaving the scene, which he got from witnesses. The Court agreed that information was not hearsay, as it was not being introduced to prove that in fact, the vehicle did leave the scene, but why the officers were seeking a vehicle of that description. In Williams v. Illinois, the Court agreed that Crawford[28] only applies when the information is testimonial hearsay. As this information was used only "to explain why a police officer took the actions he took," it was not hearsay.[29] However, the Court noted that in this situation, there was a mixed use of the information, as "in a sense, it was used to prove the truth of the matter asserted" as well. It was error, but since it was only a "single line of testimony," and it "was not the only one, or a particularly important one" of the ways Gonzalez was linked to the case.

On a minor note, the Court upheld the Tampering conviction because he did handle the rifle in an unusual manner, moving it between several vehicles in a short span of time.[30] Gonzalez's convictions were affirmed.

Michael v. Com., 2013 WL 1188052 (Ky. 2013)

FACTS: In April, 2009, North Carolina social services received a report that Michael had improper sexual contact with his stepdaughter, age 4. He agreed to have no contact with her or his two daughters during the investigation. In August, Michael and his wife moved all three girls to Michael's parents' home in Alabama and it was recommended he continue to have no contact with them. However, in September, they all moved to Bardstown. In October, 2010, Det. Roby (Bardstown PD) received a report from CHFS that he was possibly abusing two of the girls, who were living with his wife, but not him, and they were moved to foster care.

Michael was interviewed at the Bardstown PD by Det. Roby and Social Worker Newton on November 1. He was told he was not under arrest, but was given Miranda warnings. He waived those rights and agreed to talk. He admitted having touched the stepdaughter on her genitals but denied anything more. He consistently denied having touched his own daughters at all.

About 1 ½ hours into the interrogation, Det. Roby said "As of right now, you are not allowed to be around any of the children." Two minutes later, she said "You are not to have any contact with your children. Until you admit to everything, you are not having contact with your children." He maintained he'd told them everything. Newton then said

[28] Crawford v. Washington, 541 U.S. 36 (2004).
[29] Chestnut v. Com., 250 S.W.3d 288 (Ky. 2008) (quoting Sanborn v. Com., 754 S.W.2d 534 (Ky. 1988)).
[30] See Mullins v. Com., 350 S.W.3d 434 (Ky. 2011).

"You know, before you can see any of your kids you will have to complete a sexual abuse assessment treatment program, and if you're not honest with me you'll never get to see them and I'll make sure of that. So until you can sit here and tell us what really happened, nobody here is going to get help—nobody—and especially those little girls and you won't get to see them." Finally, Roby said "You're going to continue the rest of your life without seeing your children, because you want to bottle this up and you're too embarrassed and you just want to throw your time away with your children for the rest of your life because you don't want to talk about it."

The interrogation ended. Michael was allowed to leave but was arrested a short time later. He was interrogated again, this time by Det. Roby and Det. Davis. He admitted that he did much more, at this point, suggesting he may have committed sodomy on the stepdaughter. He confessed in writing.

Michael argued for suppression, claiming that the confession was coerced by the earlier statements about his children. The trial court suggested the questioning was inappropriate, but overall, that his statements were given voluntarily.

Michael was convicted and appealed.

ISSUE: Is the voluntariness of a confession critical?

HOLDING: Yes

DISCUSSION: The Court looked to Culombe v. Connecticut[31] in which it framed the issue:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

The Court agreed that voluntariness must be assessed on the totality of the circumstances.[32] The threshold question is the "presence or absence of coercive police activity."[33] The burden falls to the Commonwealth to establish a confession is voluntary.[34]

The Court also looked to Lynumn v. Illinois[35] and the "coercive nature of preying upon a suspect's parental instincts in order to induce a confession." The court also looked to other state's decision in which officers threatened to remove children unless a

[31] 367 U.S. 568 (1961).
[32] Mills v. Com., 996 S.W.2d 473 (Ky. 1999) (overruled on other grounds by Padgett v. Com., 312 S.W.3d (Ky. 2010)).
[33] Bailey v. Com., 194 S.W.3d 296 (Ky. 2006).
[34] Tabor v. Com., 613 S.W.2d 133 (Ky. 1981).
[35] 372 U.S. 528 (1963),

confession is given. In Stanton, the Court differentiated, however, finding in that case that the statements were not threats, but instead were "an accurate statement as to the usual next step when a suspect in a child sexual abuse case declined to cooperate and children were deemed to be at risk."

In this case, the Court agreed that the statements were given in a threatening manner. In particular, the court noted that the children were already in foster care. However, the Court noted that the alleged improper questioning did not, in fact, cause him to make any incriminating statements and as such, his later confession was not tainted by the earlier impropriety.

Michael also argued that he'd gone without sleep and was intoxicated at the time, but the Court noted that on the recording, he "never slurs his words or otherwise exhibits any signs of intoxication or fatigue." He stated at the time that he had not had any alcohol or drugs in the 24 hours prior to the interrogation. He had been given Miranda twice, and as he was extremely intelligent, clearly understood the situation.

The Court found his statements were voluntary and upheld his conviction for Sodomy and Sexual Abuse.

TRIAL PROCEDURE / EVIDENCE – SUSPECT IDENTIFICATION

Payne v. Com., 2013 WL 1188052 (Ky. App. 2013)

FACTS: On April 1, 2010, Buffalo Trace Gateway Narcotic Task Force did a controlled buy in Mason County with the help of a CI, Galliher. He arranged to buy from Smith, but the delivery was made by Payne – who Smith called "Walter." The CI provided the license number to the officers, who tracked the vehicle to Morton. Payne was found at Morton's home and scales with residue were also recovered there.

Payne was indicted. At trial, the CI identified Payne, but the jury could not reach a verdict. At the retrial, the CI could not be located and a "video replay" was provided from the previous trial. Payne was convicted and appealed.

ISSUE: Must an identification by a CI be proved at trial?

HOLDING: Yes

DISCUSSION: Payne argued that the CI did not sufficiently prove his identification at the present trial, as Payne did not appear in an actual frame of the video replay. The Court agreed, but noted that the informant "referred to him plainly by more than one name and indicated without hesitation that he observed Payne deliver cocaine to Smith."

Payne also argued that it was impermissible to permit Officer Fegan to testify as to what was found in the Morton home which suggested crack cocaine manufacturing (scales

and baking soda). The Court found the evidence to be probative and correctly admitted. The Court also agreed that he was properly denied an instruction on possession in addition to trafficking, as he clearly did, in fact, traffick rather than merely possess.

Payne's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – RIGHT TO SILENCE

Thomas v. Com., 2013 WL 1188030 (Ky. App. 2013)

FACTS: On March 10, 2010, Dublin answered a knock on his door. A masked man entered the home, looked around and left. Dublin tried to lock the door, but three more masked men entered, knocking him to the floor. They told him to sit in a chair and not move. He was threatened with a knife and when he grabbed for it, cut his finger. Finally they took $110 from his wallet and left. Dublin called for help and Deputy Wyant (Hickman County SO) arrived.

Dublin identified one of the intruders as possibly being Smith, who he knew from work he'd done previously at Dublin's house. Det. Miller, KSP, arrived and took over the investigation. He found Smith and interviewed him, and eventually, Smith implicated Crumble and Thomas. Crumble also implicated Thomas.

Thomas was indicted for Complicity to commit Burglary, Robbery and Assault.[36] He was convicted and appealed.

ISSUE: Is it improper to mention a person's not speaking to law enforcement at trial?

HOLDING: Yes

DISCUSSION: During the trial, Det. Miller was asked about his investigation. He related that once Thomas was identified as being involved, he tried to interview him, but Thomas refused to talk. Thomas requested a mistrial, arguing that Miller improperly referred to Thomas exercising his right to remain silent, which had also apparently been the subject of a motion in limine. The Court agreed that it is "well settled that the Commonwealth may not comment "in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody."[37] However, apparently an admonition to the jury was not requested, and had it been, it presumably would have cured the issue. In addition, the testimony was not "devastating" to the defense, particularly in the context to which it was given, a summary of the investigation.

The Court upheld Thomas's convictions.

[36] A charge of participating in a criminal syndicate was dismissed prior to trial.

[37] Hunt v. Com., 304 S.W.3d 15 (Ky. 2009); see also Doyle v. Ohio, 426 U.S. 610 (1976); Romans v. Com. , 547 S.W.2d 128 (Ky. 1977).

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Benton v. Com., 2013 WL 1188006 (Ky. 2013)

FACTS: On May 25, 2006, in Lexington, Benton requested marijuana from Allen. When Allen said he had none, Benton fired a gun into the floor next to Allen, and then chased him "down the street while firing bullets in his direction." A little later, Benton (and Wright) visited the Mattingly home; four people were present. They knocked and then forcibly entered at gunpoint. Benton robbed Will Mattingly and assaulted and robbed Procter. John Mattingly called for police and Wright shot him in the head, killing him. Wright and Benton fled, while still shooting.

Both men were tried. Wright took a guilty plea to John Mattingly's murder. Benton was found guilty of complicity in the robberies, the homicide, the assaults and related charges. He appealed.

ISSUE: May statements made to attempt to exonerate one be admitted at trial?

HOLDING: Yes

DISCUSSION: In the midst of a number of other issues, Benton attempted to introduce statements made by Wright to Det. Brislin, in which Wright stated that both of them knew that the Mattinglys were selling marijuana from the house. The court agreed that such statements would clearly be hearsay and not subject to the exception cited by Benton – a "statement against interest"[38] The Court noted, instead, that his statements 'were likely made in an attempt at exoneration." Given that Wright was already incarcerated for charges including capital murder, it was unlikely that he was concerned about possible liability for buying marijuana.

Benton's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – SEPARATION OF WITNESSES

Harriston v. Com., 2013 WL 1003074 (Ky. App. 2013)

FACTS; Harriston and his son, age 9, were living with Partin and her four children in Bell County. Having only two bedrooms, the children were divided between the two bedrooms, with two girls in one and three boys in the other. Harriston and Partin slept in the living room. On March 11, 2009, they followed the nightly bedtime routine, with the children retiring to their bedrooms at 8 p.m., where they were allowed to watch TV. When he entered the bedroom to speak to one of the girls, he found her asleep, and allegedly the other girl hugged and attempted to kiss him. According to the girl,

[38] KRE 804(b)(3).

however, he "kissed her, put his tongue in her mouth, and caressed her buttocks." He later cautioned her not to tell anyone what happened. However, she told friends at school, who reported it to the mother of one of them who was also a teacher. The teacher reported it and ultimately, Harriston was charged with sexual abuse 1st. He was convicted of the charge, along with PFO. Harriston appealed.

ISSUE: May a witness be permitted to testify that has been in the courtroom prior to their testimony?

HOLDING: No (as a rule)

DISCUSSION: Harriston argued that certain evidence was improperly excluded that would have been to his benefit. First was a voicemail message from Partin's prior boyfriend who supposedly stated that he knew that the allegations were false. He testified, but recanted that information. Unfortunately, he had spoken to a defense investigator about it, but she was not permitted to testify to impeach the witness because she had been present in the courtroom all day, not having anticipated being called as a witness. Although exceptions can be made to the separation of witnesses rule, the defense did not make an adequate case that it was essential and as such, the Court ruled that exclusion was appropriate.

The Court affirmed Harriston's conviction.

Medcalf v. Com., 2013 WL 1003074 (Ky. App. 2013)

FACTS: On February 18, 2011, Medcalf was observed at a Henderson Wal-mart by an off-duty narcotics detective, Conley (KSP). He saw that Medcalf was "fidgety" as he picked up a card to purchase restricted products. He "reported that Medcalf could not keep still as he waited" and that attracted his attention. Upon investigation, he learned that Medcalf showed Tennessee ID.

Det. Conley contacted Det. Herndon (Henderson PD) about his suspicions, who in turn contacted Officer Stone. Officer Stone found the vehicle in which Medcalf left, and observed it fail to give a turn signal when changing lanes (KRS 189.380(1)).[39] It turned out that the vehicle was uninsured and Medcalf's OL had been revoked. He gave consent to a search of the vehicle. Officer Stone and Det. Herndon, who had arrived, searched the vehicle, finding the recently purchased medication along with other evidence of manufacturing, including salt, lithium batteries, instant cold packs and starter fluid, along with a first aid kit that contained syringes. Medcalf was arrested and indicted. He moved for suppression of the syringes, claiming that they would confuse the jury, as not being relevant to the charge of manufacturing. The Court denied the motion, noting that methamphetamine could be injected.

At trial, Det. Conley testified about how methamphetamine was created and identified the items as being part of the process. Medcalf was convicted and appealed.

[39] Wilson v. Com., 37 S.W.3rd 745 (Ky. 2001).

ISSUE: Are syringes proof of an intent to use an injected drug?

HOLDING: Yes

DISCUSSION: Medcalf argued that the syringes were irrelevant to the charge and were also prejudicial, containing "improper evidence of other crimes, wrongs, or acts." The Court looked to KRE 401/402 and concluded the evidence was both probative and showed an intent to use the substance, pursuant to KRS 218A.010(18). The Court agreed that there was sufficient evidence against him to support the conviction.

Medcalf's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – AUTHENTICATION

Simmons v. Com., 2013 WL 674721 (Ky. 2013)

FACTS: Simmons's recently departed girlfriend, Tiffany, accessed his Facebook account and "discovered sexually suggestive messages between Simmons and E.J. " She told her father and brother, and they discovered that E.J. was a middle school student (presumably under 16). They printed out the Facebook messages and contacted CPS. Det. Knoll (McCracken County agency) contacted Facebook with a search warrant and received official records of the messages sent. He interviewed E.J. who explained that she had met Simmons during a weekend family visit and that they eventually had sex during that weekend. She had deleted additional text messages from her phone, but had recorded them in her diary.

Simmons was indicted for Sexual Abuse, Sodomy 3d and Rape 3d. The messages were introduced against him and he was ultimately convicted. Simmons appealed.

ISSUE: Must writings be authenticated to be admitted at trial?

HOLDING: Yes

DISCUSSION: Simmons argued that the admission of the "unauthenticated communications" violated KRE 901 and 1002. With respect to the text messages, the Court noted that E.J. read them into the record but her diary was not introduced into evidence. As such, they were used to refresh her recollection as to the exact text of the messages, a proper exception to the hearsay rule (KRE 803).

With respect to the Facebook messages, Simmons argued they were not authenticated. The Court noted that since they were admitted, a proper foundation would have been needed. The Court noted that the initial printout and the information received by search warrant "contained essentially the same information." E.J. testified that those were the messages she received, the girlfriend's father agreed they were the messages he accessed and printed out and Det. Knoll testified that the printouts were the ones he

received pursuant to the search warrant. The Court agreed that 'a writing's content, taken in conjunction with the circumstances, can be relied upon in determining authentication." Once the judge, as gatekeeper admits it, it falls to the jury to determine the credibility of the writing. The Court agreed the messages were properly admitted.

Simmons' convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE – EXPERT WITNESS

Blount v. Com., 392 S.W.3d 393 (Ky. 2013)

FACTS: Blount stood trial in Graves County for the alleged sodomy and sexual abuse of his step-granddaughter, who was under 12 at the time. During the trial, the child's mother and father were permitted to testify about changes in the child's behavior, "which the mother implied were symptomatic of child sexual abuse based upon discussions she had with … the clinical psychologist who counseled" them.

Following his conviction, Blount appealed.

ISSUE: May a lay witness introduce evidence of child sexual abuse accommodation syndrome?

HOLDING: No

DISCUSSION: Blount argued that permitted the testimony was inadmissible evidence of "child sexual abuse accommodation syndrome" (CSAAS). The Court noted that the trial court did properly sustain the objection and provided relief on the matter, and affirmed the conviction. However, it further noted that there existed an apparent belief that "lay witnesses may testify about a putative victim's behavioral changes to imply what the expert is forbidden from saying directly – that behavioral changes signify sexual abuse." (The Court noted that there was already a "well-established line of cases prohibiting expert opinion on CSAAS."[40]) The Court agreed that to suggest that her "behavior was indicative of abuse is … misleading and prejudicial" as such symptoms, as describe, come with no pedigree of scientific acceptance."

The Court implied that had he made a further objection to the continuing comments of the witnesses, past the first objection, the matter may have been different and his conviction overturned. Because he did not timely request the relief of a mistrial, it was not a valid issue for the appellate court to address.

[40] Bussey v. Com., 697 S.W.2d 139 (Ky. 1985) and Lantrip v. Com., 713 S.W.2d 816 (Ky. 1986).

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Ordway v. Com., 2013 WL 2257673 (Ky. 2013)

FACTS: Ordway was riding with two friends, Turner, who was driving, and Lewis, who was in the back seat behind Ordway. Both Turner and Lewis were armed; Ordway had drugs. Ordway later testified that Lewis put a gun to his head and threatened him to "give it up." Turner also had a gun out. Ordway said he gave them all his drugs but they were not satisfied. He smacked the gun from Lewis's hand and grabbed Turner's gun. He shot both of them and the vehicle crashed. Ordway got out and then saw that Lewis was also getting out, with a gun. Ordway grabbed the gun and shot Lewis with it, twice.

The crash drew many witnesses, who testified as to what they saw. Many reported that Ordway reach back into the vehicle and shoot the other two. Two testified that Ordway approached their cars and tried to take them. (Ordway agreed he'd done so, but that he was only seeking help.) Emergency responders found Ordway "stumbling around in the middle of the road, talking to himself." Both shooting victims "were found buckled into their seat belts." During transport, Orway alternated 'between periods of screaming agitation and periods of non-responsiveness." He was restrained at the hospital.

Det. Wilson, Lexington PD, interviewed Ordway briefly. Ordway said he's shot them in self-defense and that they were his friends, but "somewhat inconsistently, that he did not really know them." Det. Wilson later testified that Ordway's "behavior in the aftermath of the shooting was not consistent with the behavior of the typical person who had acted in self-defense." Lewis was found to have fake crack cocaine ("fleece") in his pocket, but it was lost before testing. The police found ecstasy and marijuana in the vehicle. An audio recorder was also located in the vehicle and initially, Ordway's attorney was told there was nothing on it. Later, however, it was learned that there were comments captured on it that might be exculpatory. (He moved for a mistrial but was denied.)

Ultimately, Ordway was convicted and sentenced to death. He appealed.

ISSUE: May an officer testify as to how people typically behave?

HOLDING: No

DISCUSSION: Ordway argued that permitting Det. Wilson to testify how people might respond to a self-defense situation was improper. In his testimony, Det. Wilson "implied that he had unique expertise in how those who have lawfully engaged in self-protection act, and then authoritatively testified through opinion testimony that [Ordway], by the way he acted following the shootings, did not fit that profile." The Court agreed that "the testimony was incompetent because it permitted the police detective "to authoritatively suggest how innocent persons behave after they lawfully engage in an act of self-defense, and to then, with some measure of certainty, exclude Appellant from

that class of persons based upon his conduct following the shooting." [41] The Court noted that it was improper to "introduce evidence of the habit of a class of individuals either to prove that another member of the class acted in the same way under similar circumstances or to prove that the person was a member of that class because he acted the same way under similar circumstances."[42] It was permissible for a prosecutor to argue it, but the final decision must be left to the jury, and not swayed by a witness urging the jury "to depend upon his apparent expertise as a police officer and his perception and opinion about matters outside the realm of common knowledge. The Court does "not recognize as legitimate subjects of expert opinion, 'how guilty people typically behave' or 'how innocent people do not act.'"[43] The Court concluded that "the opinion of an experienced and respected police detective that Appellant's conduct did not match the stereo-typical conduct of an innocent person acting in self-defense authoritatively portrayed Appellant's defense as a fabrication." Finding that the testimony was "clearly devastating," the Court agreed that it justified reversal.

The Court also looked at several other issues that arose. Ordway argued that Det. Wilson's testimony that Ordway invoked his right to silence (rather profanely) was improper. The Court agreed that "the Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been informed of his rights and taken into custody."[44] The Court considers it "fundamentally unfair if the price of exercising the right to remain silence was the prejudicial effect of appearing to be uncooperative with police." However, in this case, Ordway pre-empted the detective even reading the Miranda warnings (after which the "statement would indisputably have been inadmissible") by blurting out his refusal to talk before he was given those warnings. Nevertheless, the Court agreed the evidence was irrelevant and should have been excluded.[45]

The Court reversed Ordway's conviction, but did rule on a number of other disputed issues in anticipation of retrial.

TRIAL PROCEDURE / EVIDENCE – CONSTRUCTIVE POSSESSION

Shemwell v. Com., 2013 WL 489616 (Ky. App. 2013)

FACTS: On August 4, 2009, 38 guns were stolen from a Daviess County gun shop. They were ultimately recovered in several states. Shemwell was indicted for receiving stolen property (seven rifles, three handguns, specifically identified). At trial, the owner testified that nine of the guns which were at the trial were stolen, the 10th was actually in the possession of the ATF and not available for trial. That last weapon was actually found in Barksdale's possession, but Shemwell was connected to the weapon by

[41] See Johnson v. Com., 885 S.W.2d 951 (Ky. 1994).
[42] Miller v. Com., 77 S.W.3d 566 (Ky. 2002); KRE 406.
[43] Newkirk v. Com., 937 S.W.2d 690 (Ky. 1996).
[44] Doyle v. Ohio, 426 U.S. 610 (1976); Romans v. Com., 547 S.W.2d 128 (Ky. 1977); see also Miranda v. Arizona, 384 U.S. 436 (1966).
[45] The court discounted the argument that his refusal to talk exhibited guilt.

Barksdale's girlfriend. (She did not specifically identify the weapon, however.) Neither was Barksdale's uncle, who found the weapon at Barksdale's apartment, asked to identify it either.

Lawrence, who was found in possession of seven of the weapons, also did not identify the ones he'd possessed, testified that he got them from Barksdale. Investigators found only two of the weapons actually in Shemwell's home.

Shemwell was convicted on all ten counts and appealed.

ISSUE: Must a defendant be specifically linked to stolen weapons?

HOLDING: Yes

DISCUSSION: Shemwell argued that there was insufficient evidence connecting him to the eight weapons. The Court agreed that although circumstantial evidence was sufficient, that the "longer the chain of circumstantial evidence, the less reasonable it becomes for the jury to infer guilt." The greater the distance between the receipt of stolen property and the crime is, the weaker the chain.[46]

The Court noted that the evidence suggested that "Shemwell *may* have possessed guns that *may* have been stolen." However, there was nothing linking him to the weapons in question. The Court reversed his conviction for the seven weapons found in which there was no connection between Shemwell and the crime.

TRIAL PROCEDURE/ EVIDENCE – ESCAPE

Mapel v. Com., 2013 WL 132573 (Ky. App. 2013)

FACTS: On October 16, 2008, Mapel, an inmate at the Montgomery County Regional Jail, was helping unload a delivery. He disappeared. He was apprehended the next day by KSP. At trial, Deputy Jailer Daniels and Jailer Myers were asked if Mapel had escaped. Over objection that it was a legal conclusion, Daniels was allowed to state that Mapel escaped. Jailer Myers also testified he'd been told that Mapel had escaped.

Mapel was convicted and appealed.

ISSUE: Is the use of the term "escape" permitted to describe a prisoner's action?

HOLDING: Yes

[46] Pearson v. U.S., 192 F.2d 681 (6th Cir. 1951).

DISCUSSION: Mapel argued that both gave "inadmissible opinion testimony regarding the ultimate issue of fact" – that he "escaped." The Court noted that under KRE 701, a non-expert witness may testify to those things that rationally based on their own perception" and within their personal knowledge. In this case, neither made express conclusions "as to how Mapel's conduct conformed to the legal definition of escape," they simply used the term as non-experts would do so.

Mapel's conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE – ESCAPE

Sammons v. Com., 2013 WL 375485 (Ky. App. 2013)

FACTS: On October 3, 2009, Deputy Knipp (Boyd County SO) responded to an unconscious man in a parked car at a Cannonsburg Wal-Mart. He was able to rouse the subject and the man (Sammons) got out. He "appeared intoxicated, with glassy eyes and slurred speech." He denied being under the influence and consented to search, the deputies found two pairs of jeans in the vehicle which Sammons stated he was returning to the store. Inside a pocket, they found two pill bottles in Sammons' name, contained oxycodone and Xanax, both having been filled by Sammons the previous day. They saw that 104 of the Oxycodone were missing, as were 46 of the Xanax, and Sammons said that a woman had stolen them. He was arrested for trafficking. A large amount of cash was found on his person.

Sammons was convicted and appealed.

ISSUE: Is possession of a quantity of drugs sufficient to prove intent to traffic?

HOLDING: Yes

DISCUSSION: Sammons argued that there was no evidence he'd sold or intended to sell pills. The Court agreed that the quantity of drugs and other evidence was sufficient to prove that he was trafficking.

Sammons' conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

Cornelius v. Com., 2013 WL 45265 (Ky. App. 2013)

FACTS: On October 9, 2010, Officer Creason (unidentified Bullitt County agency) spotted Cornelius's vehicle cross the center line. He observed additional erratic driving and attempted a traffic stop, but Cornelius continued driving onto I-65, reaching speeds of 100 miles per hour. Eventually, they entered Louisville and got onto the Watterson Expressway. Finally, the vehicle stopped and the passenger fled. The officers

apprehended Cornelius, who claimed the passenger "had hit him in the face with a gun and had forced him to keep driving." The passenger was never identified.

Cornelius was indicted on Fleeing and Evading and related charges. He was convicted and appealed.

ISSUE: Must all law enforcement reports be provided to the prosecution prior to trial?

HOLDING: Yes

DISCUSSION: Cornelius argued that he was entitled to a dismissal because at trial, it became clear that Officer Creason had prepared a report that had not been provided to Cornelius prior to trial. The Commonwealth had informed the Court, when the matter arose, that it was unaware of the report. It was subsequently provided. At that point, the Court had offered a mistrial, which Cornelius did not want, and the Court stated that if he wanted to continue, he would have to waive objections to the report. The Court agreed that his decision to go forward did, in fact, waive any objections to the report, particularly since the Court had agreed that there was a discovery violation. (In fact, the denial to accept a mistrial was a strategic defense decision.)

Cornelius also argued that the elements were not proven for Fleeing and Evading 1st, as no substantial risk of injury was proven. The Court disagreed, noting that the officers testified there were other cars on the road and that at one point, Cornelius had veered into Creason's lane.

TRIAL PROCEDURE/ EVIDENCE – LESSER INCLUDED OFFENSES

Maziarz v. Com., 2013 WL 1002512 (Ky. App. 2013)

FACTS: In 2011, Maziarz and Hanna Parker ended their relationship, which had produced two children. They had previously lived with Shawna Parker, Hanna's mother. On July 1, 2011, the children were staying in Berea with Shawna while Hanna was out of state. Maziarz came to the residence at about 2 a.m. the next morning and "told Shawna that he had not seen the children in a long time and just wanted to sit with them." She allowed him in and went to bed. A few minutes later, he knocked on the bedroom door, telling her he was leaving. Believing he had left, she went into the living room a few minutes later. Maziarz, still there, grabbed her and dragged her into the bedroom. She was able to get a handgun, but couldn't cock it because it was under her body. Maziarz grabbed the gun and struck her in the head with it. He sexually abused and attempted to rape her.

The children came in "screaming and crying." The two continued to struggle and eventually Maziarz went outside. Shawna called her boyfriend and son. Maziarz called the police, claiming Shawna had sexually assaulted him. Officer Edwards, responding,

found that Maziarz was "nervous and excited and smelled of alcohol." Shawna, on the other hand, was visibly upset and was crying and did not smell of alcohol." Maziarz was taken to the police station (for his own safety) and subsequently arrested.

Maziaz was indicated for attempted Rape and for Sexual Abuse. He claimed that they had a consensual sexual relationship but that she'd eventually turned a gun on him. Shawna denied any relationship. He was convicted and appealed.

ISSUE: Does calling a person a victim constitute an impermissible legal opinion?

HOLDING: No

DISCUSSION: Maziarz argued that he should have been given an instruction on Assault 4th as a lesser-included offense of Rape 1st. The Court disagreed. The Court also addressed a question as whether Officer Edwards testified improperly by calling Shawna a victim, suggesting that he was offering an opinion on the ultimate question of Maziaz's guilt or innocence. The Court noted that the officer was simply reporting on her demeanor, and that the admission was not improper.

Marziaz's conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE – RULE 7.24

Price v. Com., 2013 WL 191189 (Ky. App. 2013)

FACTS: On May 3, 2010, a teacher for Price's minor child, in Boone County, saw bruises. The teacher contacted CHFS, which responded, along with Det. Stahl (Boone County SO). Both Price and the child were taken to the station that evening and interviewed separately. Price admitting to spanking the child, but the child said that Sanders, her mother's boyfriend, did it.[47]

Price was indicted on Criminal Abuse 1st. The teacher testified to an earlier injury, a black eye, that she'd also reported. The child testified that both Price and Sanders had beaten her. Sanders testified that both he and Price had beaten the child. Price admitted spanking but denied everything else. Price was convicted and appealed.

ISSUE: Must oral incriminating statements be provided in discovery?

HOLDING: Yes

DISCUSSION: Price argued that the teacher should not have been permitted to testify because the prosecution "disclosed the substance of her testimony only five days prior to the trial." The prosecution had been ordered to provide discovery under RCr

[47] Sanders pled guilty to Criminal Abuse 1st.

7.24, which requires that any oral incriminating statements be provided. However, the teacher's statement did not include any such statements and 7.26, which requires all statements no later than 48 hours prior to trial. The information was provided five days before the trial and thus was timely.

Price's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – LAB REPORTS

Stambaugh v. Com., 2013 WL 645746 (Ky. App. 2013)

FACTS: On January 13, 2010, Stambaugh found her grandson, Draven, 5 months, dead in his crib. Her daughter, Heather, and Draven, lived with her. She called EMS, telling the EMTs that she'd given Draven "some children's medicine for allergy relief." Draven was later found to have toxic levels of diphenhydramine (Benadryl) and carisprodol (Soma, a prescription pain reliever). Both Stambaugh and Heather were charged with Manslaughter, 2nd. Stambaugh was convicted and appealed.

ISSUE: Are toxicology tests down during a routine autopsy admissible when introduced by someone other than the actual technician?

HOLDING: Yes

DISCUSSION: Stambaugh argued it was improper to introduce the toxicology report regarding the Soma. The test was done at AIT Laboratories (in Indianapolis) at the behest of the Kentucky Medical Examiner. Neither toxicologist that testified had "personally identified the Soma in the tests." The Court noted that the test was not done for the purpose of proving a fact at trial, but was done at a routine autopsy. There was no indication of a crime until the tests came back. Although the witness did not perform the test, he did review the report, which was based completely on computer printouts.

Further, the Court agreed the diphenhydramine, which Stambaugh admitted, was fatal on its own. Other witnesses testified that Stambaugh had talked about giving the baby Benadryl and that her daughter had hidden it on occasion.

The Court agreed the admission of the testimony was proper.

EMPLOYMENT

Sparks v. City of Oak Grove, 2013 WL 53985 (Ky. App. 2013)

FACTS: On January 16, 2009, at about 2:30 a.m., Captain Sparks (Oak Grove PD) was involved in a high-speed chase. The vehicle entered Tennessee with Sparks and other officers, in pursuit, and stopped. Eventually, they broke out the windows. Sparks

pepper-sprayed and handcuffed the subject. He began begging to be shot. Sparks decided to take him to the hospital in Fort Campbell as the driver was a veteran.

Captain Sparks left a memorandum for Major Langdon, as he was not scheduled to work for the subsequent four days. Langdon, finding some of Sparks' actions improper, suspended Sparks with pay and initiated an investigation. Langdon then recommended termination and on February 9th, the suspension was converted to unpaid. The gist of the concern "revolved around the commission of numerous felonies and misdemeanors by the criminal suspect during the high speed pursuit without any criminal charges being filed by Sparks" and he presented criminal charges for official misconduct. The Special Judge assigned dismissed those charges.

On December 9, 2009, Sparks was given an administrative hearing. Chief Perry and Major Langdon both testified that "they believed Sparks had no intention of ever filing charges against the suspect, only that he intended to dump the suspect at the military hospital and 'be done with it.'"

Mayor Potter, who sat as the hearing officer, terminated Sparks. Sparks appealed.

ISSUE: Is an employment hearing before the mayor sufficient under KRS 83A?

HOLDING: Yes

DISCUSSION: Sparks argued that he was entitled to a hearing before the Council, not just the Mayor, under KRS 15.520(1)(h). However, since under KRS 83A.130(9), the mayor serves as the appointing authority. As such, the Court agreed that the hearing before the mayor was appropriate authority to lead the hearing required. Sparks looked to KRS 95.765, which required that the hearing be before the legislative body, but that statute only applies when the city has adopted a civil service system. As there was no evidence that Oak Grove had, in fact, done so, the statute does not apply.

Sparks also argued that he was never given the charges in a "clear and specific writing" as required by KRS 15.520(1)(3). The Court agreed, however, that the letters, along with a supplemental form, from the Mayor sufficed to meet the requirement and upheld the termination.

EMPLOYMENT – DISCIPLINE

Murphy v. City of Richmond, 2013 WL 1163802 (Ky. App. 2013)

FACTS: Shortly before October 26, 2009, Sgt. Rogers responded to a domestic violence call at McQueen's home. They began a sexual relationship following that incident. On October 26, Rogers, Murphy and another officer went to McQueen's home to have group sex, during which McQueen suffered several injuries, including a split lip and bruises. She went to get ice from a neighbor, who encouraged her to report it.

McQueen refused, but the neighbor and others reported it on their own. She was "coerced" to go to the hospital and get treatment, but refused a rape kit, as she believed she had not been raped. During the subsequent interview, she made statements that made the investigators believe that crimes had occurred. Richmond suspended the officers and they were also indicted. The criminal charges were dismissed after a jury absolved the officers of a crime.

At the subsequent hearing, the IA investigator stated that he believed criminal charges should not have been placed. The chief admitted that once the case became publicized, and the bad press ensued, other officers became concerned about working with the officers. But, he agreed, had the criminal charges not been filed, no administrative charges were likely to have been placed.

Murphy and Rogers were terminated by the Commission. They appealed.

ISSUE: May legal private conduct that becomes public be a cause for termination?

HOLDING: Yes

DISCUSSION: Murphy argued that the Commission did not make a sufficient findings of fact and that his actions did not cause any negative impact on the department. The Court agreed that they did, in fact, do so, but did not "cite to the evidence it relied on in making those findings of fact." The Court agreed that it was sufficient.

Murphy argued that his "discipline was based, not on his conduct, but on the negative impact of publicity over which he had no control." The Court agreed that completely private behavior does not reflect on the department, but unfortunately, in this case, it did become public. He "took the risk that his conduct would become public." The Court agreed the termination was properly based upon Conduct Unbecoming and Conduct Impairing the Police Department.

CIVIL LIABILITY – MALICIOUS PROSECUTION

Oakley v. Ballard County Sheriff (and others), 2013 WL 275641 (Ky. App. 2013)

FACTS: On December 12, 2009, Deputy Grief responded to a domestic disturbance at the Oakley home. Oakley left prior to the deputy's arrival. Finding Amie (Oakley's wife) with visible injuries, the deputy obtained an arrest warrant for Assault 4th and Fleeing and Evading 1st. Amie filed for an EPO/DVO and Oakley requested the same. Ultimately, both were dismissed.

Oakley was arrested on December 14 for the criminal charges, and the charges were dismissed at arraignment at Amie's request. Oakley sued for malicious prosecution.

The Sheriff's Office (and its defendants) filed for a motion for summary judgment. The court ruled in the Sheriff's Office favor and Oakley appealed.

ISSUE: Does an improper charge automatically prove a malicious prosecution claim?

HOLDING: No

DISCUSSION: Oakley argued that the Fleeing and Evading charge was inappropriate and that since it was dismissed at arraignment, the proceedings were resolved in his favor. (This is an element for malicious prosecution.) The Court looked to the statute itself, noting that KRS 520.095 requires that a law enforcement officer command him to stop – which did not occur. As such, he did not violate the statute when he left the location. However, the Court found no evidence of actual malice on the part of the Sheriff's Office. The Court agreed that malice could be inferred from a lack of probable cause, but "that fact alone does not conclusively establish the intent of the alleged wrongdoer."[48]

Further, the Court found no indication that Oakley made any effort to discover any facts to establish malice. The Court upheld the summary judgment for the Sheriff's Office.

CIVIL LIABILITY – IMMUNITY

Robinson & Sexton v. Kenton County Detention Center (and others), 2013 WL 560699 (Ky. App. 2013)

FACTS: In 2006, Sexton (an inmate) reported to a deputy jailer and an investigator that she'd been sexually assaulted by Stokes (a deputy jailer) a few days before. Within an hour of the report making it up the chain of command, the jailer's office began an internal investigation. The Kenton County PD was asked to do a criminal investigation. Stokes was immediately placed on leave. Two days later, Robinson (another inmate) also reported sexual assaults that had happened less than a month before. Ultimately Stokes was charged with multiple counts of Rape and Sodomy and immediately fired. Eventually, Stokes pled guilty to Sexual Abuse and related charges.

Robinson and Sexton filed suit against the Jail, the Jailer and other parties under both state and federal law, under 42 U.S.C. §1983. The District Court dismissed all claims under summary judgment and declined to exercise jurisdiction over the state law claims.

Robinson and Sexton filed an action against the detention center and the jail (and related parties) alleging negligent hiring, supervision and retention (of Stokes), and negligent operation of the jail. All defending parties requested summary judgment on sovereign immunity. The Jailer and deputy jailer (who investigated) requested qualified

[48] Mosier v. McFarland, 106 S.W.2d 641 (1937).

official immunity in their individual capacities, as well. Again, the Court found in favor of the defendants. Robinson and Sexton appealed.

ISSUE: Is the hiring of a law enforcement officer a discretionary act?

HOLDING: Yes

DISCUSSION: The Court reviewed the status of the law on immunity for governmental employees. In Yanero, the Court recognized the doctrine of sovereign immunity as it applies to the Commonwealth and political subdivisions of the state, such as counties.[49] As such, Kenton County, the Fiscal Court and the Detention Center are all entities of the county and sovereign immunity applies. That sovereign/absolute immunity extends to public officials facing suit in their official capacities.

With respect to suit in their individual capacities, the Court again looked to Yanero, noting that public employees/officers are "entitled to 'qualified official immunity' for negligent conduct when the negligent act or omissions were (1) discretionary acts or functions, i.e., those that involve the 'exercise of discretion and judgment, or personal deliberation, decision and judgment,' (2) that were made in good faith and (2) were within the scope of the employee's authority." There is no immunity for the "negligent performance or omissions of a ministerial[50] act, or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive." Robinson and Sexton argue that hiring Stokes was a ministerial function in that they "should have been aware of Stokes's propensity to commit sexual assault from his criminal history, his poor performance on the police academy training test, and his repetitive tardiness and absenteeism." In contrast, though, the Court found that the hiring was "based upon an evaluation of numerous factors, all of which underscore the discretionary nature of the hiring decision." The question, instead, was "whether they acted in good faith." Just because someone was harmed "by a bad or even negligent decision by a public employee will not convert the action into 'bad faith' and defeat" qualified immunity. The court found no reason to believe that the jail staff had any reason to believe Stokes would commit sexual assault from his history, there was simply no correlation between is history and the crime.

The Court upheld the award of qualified immunity.

Louisville-Jefferson County Metro Government / Bishop v. Brooks / Martin, 2013 WL 645955 (Ky. 2013)

FACTS: In 1998, Brooks and Martin filed suit against Metro and Bishop, claiming to have been subjected to racial discrimination and retaliation, in violation of the Kentucky Civil Rights Act (KCRA). Metro won at trial. Brooks and Martin appealed. During the

[49] 65 S.W.3d 510 (2001).

[50] A ministerial act is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." Yanero, 65 S.W.3d at 522.

retrial, a hearing was held concerning possible apportionment of any fault, between Metro and Bishop, and Metro indicated that Metro would be fully indemnifying Bishop and that they did not distinguish between a lawsuit in Bishop's individual capacity or his official capacity. At the second trial, Brooks and Martin won, with Martin receiving a judgment over $700,000. (Attorneys' fees were also awarded of approximately $243,000.) Upon appeal by Metro, most of the judgment was affirmed.

Metro tendered a check for $949,910, which they claimed satisfied the judgment and fees. However, Brooks and Martin refused, arguing they were also entitled to post-judgment interest, pursuant to KRS 360.040. Metro objected, but the Circuit Court awarded interest at the statutory 12%. Metro appealed.

ISSUE: May a government entity be required to pay post-judgment interest?

HOLDING: Yes

FACTS: Metro argued that the KCRA does not allow for post-interest judgment against a governmental entity. Brooks and Martin countered that Bishop, as an individual, was not immune from interest, and that Metro's agreement to indemnify Bishop was a waiver of their immunity against such interest.

The Court agreed that although the possibility of interest on the judgment had not been raised before, the two were entitled to it by law. And, although Metro was correct that it is entitled to immunity, such immunity was not appropriate for awards of post-judgment interest.[51] Because Metro agreed to indemnify Bishop, and waived the right to have liability apportioned between the parties, that constituted a waiver of its immunity to the interest of a KCRA claim. The Court noted that Bishop was found liable for discriminatory and retaliatory behavior, his behavior could not have been characterized as a "good faith judgment call[] made in a legally uncertain environment."[52] Metro also argued that the judgment was not against Bishop in his individual capacity, but only in his official capacity – but the Court noted that the judgment was considered "joint and several" and did not distinguish between the defendants or their respective capacities. As such, Metro, by indemnifying, is liable for the full amount, including interest. Specifically, "by agreeing to indemnify an individual who was not immune to post-judgment interest, Metro waived its own immunity."

The decision ordering the payment of post-judgment interest was affirmed.

[51] Kentucky Dept. of Corrections v. McCullough, 123 S.W.3d 130 (Ky. 2003).
[52] Yanero, supra.

CIVIL LIABILITY - SHERIFFS

Harlan County / Duff / Hall v. Browning, 2013 WL 657880 (Ky. App. 2013)

FACTS: Former Sheriff Browning (Harlan County) was murdered in March, 2002. He had served as Sheriff previously and at the time of his death, was a candidate for the office against the incumbent, Duff. Former Deputy Sheriff Hall eventually pled guilty to Facilitation to commit the murder. In 2010, Browning's widow filed suit against Duff, alleging that he negligent in hiring, training and supervising Hall, and that he wantonly, recklessly or even intentionally directed Hall to "cause the wrongful death of Browning." She also sued Hall for committing the crime.

Duff, Hall and Harlan County argued for immunity in the lawsuit. The trial court ruled that KRS 70.040 waived any sovereign immunity for the Sheriff and his deputy at the time, Hall. They appealed.

ISSUE: May a sheriff (otherwise immune) be held liable for the acts of their deputies?

HOLDING: Yes

DISCUSSION: To start, the Court noted that it was only ruling on the issue of official immunity, not on individual immunity for Duff and Hall. The Court noted that the Sheriff is a Constitutional officer[53] who serves as the Chief Law Enforcement officer of each county. The Sheriff is also a county official and as such, is normally cloaked with sovereign immunity when sued in their official capacity.[54] As such, the elected sheriff is entitled to sovereign immunity when sued in their official capacity.

The Court looked to the statute, KRS 70.040, which reads:

> The sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section. When a deputy sheriff omits to act or acts in such a way as to render his principal responsible, and the latter discharges such responsibility, the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission.

Previous cases, including Jones v. Cross, had interpreted this provision as putting "liability on the sheriff in his official capacity for acts committed by his deputies."[55] As a result, the Court agreed, this constituted a "negative waiver of the sovereign immunity traditionally enjoyed by a sheriff at common law" and makes the sheriff liable for the acts of omissions of deputy sheriffs. As such, Sheriff Huff remains liable for the acts of

[53] Ky. Constitution §99; Shipp v. Rodes, 245 S.W. 157 (1922).
[54] Com. Bd. Of Claims v. Harris, 59 S.W.3d 896 (Ky. 2001).
[55] 260 S.W.3d 343 (Ky. 2008).

omissions of Hall, in his official capacity, but does retain official immunity for his own intentional or unintentional (negligent) torts.

Deputy Sheriff Hall, "unlike the sheriff, is not a constitutional officer named and designated in the Constitution" but is, instead, an employee of the sheriff and as such, "acts in an official capacity for that office."[56]

The Court continued:

> An action against an official in his official capacity is in reality an action against the pertinent governmental entity, and an official sued in his official capacity is shielded by the same immunity enjoyed by such governmental entity.[57]

However, in a complicated twist, although Hall would normally have shared the immunity of the Sheriff, because the legislature waived that immunity, specifically, Deputy Sheriff Hall retained liability for his own actions.

Finally, the Court agreed that Harlan County, itself, was entitled to sovereign immunity. To sum up, the Court held that Sheriff Duff was entitled to sovereign immunity for his own acts, but not for the acts of Deputy Sheriff Hall. Deputy Sheriff Hall was likewise, not entitled to sovereign immunity. The Court allowed the case to go forward.

RESTITUTION

Ellis v. Com., 2013 WL 645725 (Ky. App. 2013)

FACTS: Ellis was convicted in 2010 for the Arson/Burglary charges related to the destruction of the Carlisle County Courthouse. He was assessed restitution in the amount of over $880,000. (The new courthouse cost over $11 million.) Ellis appealed the order.

ISSUE: May restitution be based on replacement cost?

HOLDING: Yes

DISCUSSION: Ellis argued that the restitution was improper because the "county had been made whole by the insurance proceeds" – totaling $1.2 million. The Court agreed, however, that it was proper to set restitution based upon replacement costs, especially based upon the idea that a courthouse, like a church, carries "community history, associations, and memory." The Court noted that the county was without a courthouse for three years. In addition, the Court noted that they didn't even use replacement costs, but simply came up with a figure that reflected the difference between the cost of a "hypothetically rebuilt old courthouse" and the insurance payment – although such a building would have not met AOC standards.

[56] KRS 70.030.
[57] Yanero v. Davis, supra.

The Court upheld the restitution order.

DEFAMATION

Sheliga v. Todd , 013 WL 869608 (Ky. App. 2013)

FACTS: On May 25, 2011, the Todds' dog chased Sheliga while he was riding his bicycle in Rockcastle County. Sheliga yelled at the dog and Billy Todd yelled back at him, for yelling at the dog. He threatened to "blow [Sheliga's] head off." After more yelling, Sheliga left. A short time afterwards, a truck came up behind Sheliga, occupied by Billy and Jamie Todd and Billy continued to yell at Sheliga. He got out and stood on the road, "in order to fight Sheliga." Sheliga asked a nearby resident to call the sheriff. Ultimately he filed a lawsuit against the Todds (including Verna, as well) for terroristic threatening, assault, defamation and related charges. In particularly, he claimed a violation of KRS 258.235(4), which provides that "Any owner whose dog is found to have caused damage to a person, livestock, or other property shall be responsible for that damage." The trial court dismissed the action, with the exception of the assault claim. Sheliga appealed.

ISSUE: Is cursing a screaming defamation?

HOLDING: No (but see discussion)

DISCUSSION: Sheliga argued that false statements made by the Todds to Sheriff Peters and the County Attorney defamed him. The Court reviewed the elements of defamation: (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation.[58] The Court agreed the alleged defamation, that Sheliga was on their driveway "cursing and screaming about their dog" was not defamatory per se, as it did not attribute to him "a criminal offense, a loathsome disease, serious sexual misconduct, or conduct which is incompatible with his business, trade, profession, or office.[59]" The Court looked to whether the case was defamation per quod. However, because he made no allegations beyond a conclusory statement that he was defamed, the Court properly dismissed that action.

The Court also looked to his potential damages under KRS 258, and ruled that his damages, at best, that he was frightened by the dog. The Court found that it be insufficient and upheld the dismissal of that claim as well.

[58] Columbia Sussex Corp., Inc. v. Hay, 627 S.W.2d 270 (Ky. App. 1981).
[59] Gilliam v. Pikeville United Methodist Hosp. of Ky., Inc., 215 S.W.3d 56 (Ky. App. 2006).

SIXTH CIRCUIT

CONSTRUCTIVE POSSESSION

U.S. v. Braswell, 2013 WL 811809 (6th Cir. 2013)

FACTS: On February 12, 2010, Officer McNeal (Memphis PD) obtained a search warrant for Braswell's home. He and Officer Miller had used a CI to make buys and they also directly saw Braswell make hand-to-hand transactions. They observed him coming and going from his apartment. The officers, along with Officer Overly, went to execute the search warrant at about 10 p.m. There, they smelled marijuana and saw Thacker in the living room. They located Davis (Braswell's girlfriend) and her son in one bedroom and found Braswell hiding in the closet in another bedroom. The officers saw numerous ecstasy pills, along with cocaine, in the closet. Seeing a hole in the wall, they recovered "two large bags of cocaine and nine small bags of marijuana," along with small bags of cocaine and cash from Braswell's pockets. He was secured in the patrol car for the remainder of the search, in which they found a number of other items connected to drug trafficking along with a firearm. He waived Miranda and gave a written admission that he possessed the gun as it was "in the house." He indicated Davis had purchased it, however. He offered to "take the charge of everything but the gun."

Braswell, a convicted felon, was charged with the gun, along with numerous other offenses. Braswell was convicted and appealed.

ISSUE: Is constructive possession sufficient to convict a felon for having a weapon?

HOLDING: Yes

DISCUSSION: The Court agreed that although the evidence did not indicate that Braswell actually possessed the firearm, it was more than adequate to prove that he constructively possessed it. He admitted to it being in the house, and "offered detailed knowledge about the gun, such as whether it was loaded, from whom it was purchased, and for how much." A jail conversation suggested he wanted his girlfriend to "take the pistol charge" in exchange for him taking the drug charge.

Braswell's convictions were affirmed.

U.S. v. Welch, 2013 WL 238178 (6th Cir. 2013)

FACTS: Welch was the passenger in a vehicle that was stopped. As he fled, "an object fell to the ground between his feet." He "bent down to retrieve the object, made a

quick motion back toward the vehicle, then raised his hands and fell to the ground."[60] Officer found a firearm on the floor of the passenger side. When he was arrested, he spontaneously yelled "you are not putting that gun on me."

Welch, a convicted felon, was charged for possessing the weapon. He moved for suppression and was denied. He was convicted and appealed.

ISSUE: Does proximity to a weapon constitute constructive possession?

HOLDING: Yes

DISCUSSION: The Court agreed under that the facts, it was reasonable for the jury to conclude that the firearm was the object that fell to the ground and was tossed back into the car. That satisfied the elements of constructive possession under 18 U.S.C. §922(g)(1). Welch's conviction was upheld.

U.S. v. Curruthers, 2013 WL 112151 (6th Cir. 2013)

FACTS: On July 22, 2009, at noon, Officer Boyce (Memphis PD) responded to a robbery call at a pharmacy. He canvassed the area and spotted two people in an old Cadillac with a broken out rear vent window He confirmed his suspicion that the car was stolen and followed the vehicle. He could see that the two occupants were "moving all around" the car. The vehicle stopped and the passenger got out. Officer Boyce also got out of his car, to detain the passenger, and the "driver sped off." Officer Boyce elected to abandon the passenger and continued to go after the Cadillac. After a chase, the suspect vehicle stalled out. The driver got out of the passenger side and Officer Boyce could see his face and his unusual clothing (white lab coat, white gloves, etc.). During a foot pursuant, he radioed information about the suspect to other officers. Officer Davis found Curruthers running from a backyard and detained him. Curruthers was not wearing the described clothing, but Officer Boyce identified him as the driver. Curruthers was "sweating and out of breath" when caught.

Officer Washington did an inventory of the Cadillac and found two loaded pistols, gloves, a ski mask and a walkie talkie from a black bag.

Curruthers was charged with being a Felon in Possession of a Firearm. At trial, a jail phone call was introduced that suggested the passenger was supposed to "run" with the items found in the car. Carruthers was convicted and appealed.

ISSUE: Is constructive possession of a firearm sufficient for a conviction?

HOLDING: Yes

DISCUSSION: The Court noted that a conviction under 18 U.S.C. §922(g) may be "based on either actual or constructive possession of a firearm." Further, "both forms of

[60] This was clearly shown on video.

possession may be proven by direct or circumstantial evidence."[61] ""Constructive possession exists when a person . . . knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others."[62] However, "mere presence alone near a gun is insufficient to prove constructive possession."[63] There must be additional "incriminating evidence must supplement a defendant's proximity to a firearm in order to tip the scale in favor of constructive possession."[64]

In this case, the officers testified as above, and the Court agreed that taken together, implied "proof of a motive to possess the firearms because, taken together, these items could be considered tools of 'the robbery trade.'" Curruthers being observed moving around might suggest he "had some power over the firearms and had knowledge that they were there."

The Court agreed there was sufficient proof that Curruthers possessed the weapons and his conviction was upheld.

SEARCH & SEIZURE – ARREST

U.S. v. Mohammed, 2013 WL 331570 (6th Cir. 2013)

FACTS: On July 26, 2010, Officers Frith, Bauer, Boone and Young (Nashville PD) set out to execute an arrest warrant for Howard at his residence. As they approached, they found two men, motionless, slumped in chairs in the front yard, both generally fitting the description of Howard. (One, in fact, was Mohammed.) The officers were unable to rouse them with flashlights and announcements. Seeing large beer cans, realized the two men were drunk. Officer Bauer spotted a firearm in Mohammed's lap and alerted the others. Moving in closer, Officer Frith snatched the gun. Both men were proned out and cuffed. Mohammed roused, but was sluggish, confused and disoriented. Howard was identified and arrested; Mohammed was frisked. Mohammed initially denied having had a gun, but later admitted to it. Officer Young found marijuana, a holster and Mohammed's ID.

Howard's mother, upset, emerged from the house, and the officers moved both men down the street. Officer Young discovered that Mohammed was a convicted felon, so he was arrested for possession of the firearm. Mohammed was given his Miranda rights, and he agreed to answer questions. He stated he'd gotten the gun from Howard about thirty minutes earlier. The gun was, in fact, stolen.

Mohammed was indicted. He moved for suppression of the search of his person, which was denied. Mohammed appealed.

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[61] U.S. v. Newsom, 452 F.3d 593 (6th Cir. 2006).
[62] U.S. v. Gardner, 488 F.3d 700 (6th Cir. 2007).
[63] U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007).
[64] U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).

ISSUE: May otherwise possibly unlawfully gotten evidence be admitted because an arrest warrant is discovered?

HOLDING: Yes

DISCUSSION: The trial court had ruled that it was inevitable that Mohammed would have been arrested, even absent the discovery of the evidence in his pockets, because he was a convicted felon. The Court agreed that "the inevitable discovery doctrine is an exception to the exclusionary rule" which "prohibits the admission of evidence seized in searches and seizures that are deemed unreasonable under the Fourth Amendment, as well as derivative evidence acquired as a result of an unlawful search."[65] Further, the inevitable discovery doctrine "allows unlawfully obtained evidence to be admitted at trial if the government can prove by a preponderance that the evidence inevitably would have been acquired through lawful means."[66] To summarize, ""if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings."

The District Court agreed that the "search of Mohammed's person exceeded the scope of a valid pat-down." Mohammed argued that if had they not seized his wallet, they would not have learned his true identity, which is what triggered his arrest. (He claimed he would have been able to credibly represent himself as someone else and "could have denied possession of an ID.")

The Court noted, however, that the officers had lawful possession of the weapon, which was stolen, and as such, they could (and would) have arrested Mohammed for its possession. Officers confirmed that they would have almost certainly run the gun's serial number to determine its ownership. The Court agreed it was "mere happenstance that they determined he was a convicted felon and arrested him on that basis before learning that the gun was stolen."

The court agreed that the items found on Mohammed's person were properly admitted.

Mohammed also argued that his statements should have also been suppressed, but the Court agreed that the officers would have asked him the same questions (as to where he'd gotten the gun) in either event, and it is "highly likely he would have made materially similar answers." The Court agreed his statements were also properly admitted.

U.S. v. McWhorter, 2013 WL 628417 (6th Cir. 2013)

FACTS: In 2006, the Sparta (TN) PD "began investigating a series of counterfeit checks being passed at local businesses. Officer Selby got a description of one of the

[65] U.S. v. Kennedy, 61 F.3d 494 (6th Cir. 1995) (citing Wong Sun v. U.S., 371 U.S. 471(1963)).
[66] Nix v. Williams, 467 U.S. 431 (1984).

passers and eventually identified McWhorter as the person who had given him the counterfeit check. Selby obtained an arrest warrant, withholding the name of the witness because the witness was a juvenile. The issuing official typed up the affidavit, which Selby reviewed – unfortunately missing an error as to who actually made the identification.

McWhorter was arrested and interviewed, after having received his Miranda warnings. In the initial stages of the questioning, McWhorter asked about assurances for his wife, who was also under arrest. He was put in contact with the prosecutor, requesting "favorable treatment for his wife in consideration for his cooperation with the investigation." The prosecutor (Crawford) gave no guarantees but indicated they were not interested in his wife if, in fact, he committed the crimes. Crawford put nothing in writing, but McWhorter later insisted the promises were, in fact, made. He was permitted to speak to his wife (in person) and finally made inculpatory statements. He consented to a search of his house and computers. A tremendous amount of incriminating evidence was located there.

Officer Selby attempted to talk to McWhorter further the next day, but he refused, having learned that his wife was still in jail. He "declared that he would not talk" until she was released.

The following year, prior to his criminal trial and after counsel had been assigned, another officer of a different department when to the state prison where he was being held for parole violations. He waived Miranda in writing and denied any involvement with the counterfeiting case she was investigating. A few months later, he was questioned about yet another counterfeiting case. The Secret Service officer on that case, Agent Landkammer, "became aware that McWhorter was currently facing state charges. He was concerned about discussing the state charges without McWhorter's attorney present and emphasized to McWhorter that he was only interested in the federal charges he was currently investigating. McWhorter again gave inculpatory statements.

McWhorter was indicted on federal charges. He moved to suppress on several issues and was denied. He was convicted and appealed.

ISSUE: Do errors on an arrest necessarily invalidate it?

HOLDING: No

DISCUSSION: McWhorter first argued that the arrest warrant was not valid, because there was a material misrepresentation that was "at a minimum reckless disregard and perhaps intentional." The court concluded, however, that "regardless of any defects in the arrest warrant, the arrest was valid because it was supported by probable cause." Nor did he make a "substantial preliminary showing under" Franks v. Delaware.[67] Although there was a defect in the warrant, it was relied upon in good faith

[67] 438 U.S. 154 (1978).

by the arresting officers under U.S. v. Leon.[68] Further, McWhorter was unable to prove that the misstatement was "made knowingly, intentionally, or with reckless disregard."

McWhorter also argued that he invoked his right to silence in 2006 and that "his right to silence was not scrupulously enforced." He also argued that his right to counsel was violated when he was interviewed on two separate occasions in 2007. Taking each instance in turn, McWhorter told a federal agent that he did not want to talk to him anymore. At the time he was angry but he quickly became calm and cooperative again. Within minutes, he agreed to talk to two other officers and made inculpatory statements. The Court agreed that his statement to the first officer "was ambiguous when placed in context and that it was not an unequivocal assertion of his right to remain silent."[69] in that he "specifically directed his statement only to" a particular officer.

McWhorter next argued that some of his statements were made as a result of an agreement about leniency for his wife, and that because the "state authorities did not follow through with their part of the agreement, his statements were coerced and not voluntary." To find a statement involuntary due to coercion, three requirements must be met: (1) the police activity must be objectively coercive; (2) the coercion must be sufficient to overbear the defendant's will; and (3) the alleged police misconduct must be the crucial motivating factor in the defendant's decision to offer the statement.[70] The Court agreed that he was "most likely promised something regarding his wife," to be reduced to writing, but it was unclear what, exactly, what that promise actually was. However, the Court agreed that it was appropriate for the trial court to find only that if he cooperated, that would be shared with the prosecutor.

Finally, the Court looked at his right to counsel claim under Edwards v. Arizona.[71]

The court summarized the law, as follows:

> An accused who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[72] Moreover, police may not question a defendant about any unrelated crimes after invocation of the right to counsel, even if such crimes are the subject of a separate investigation.[73] Further, where a defendant has requested and been provided counsel, police may not reinitiate an interrogation without the presence of counsel.[74]
>
> However, in Maryland v. Shatzer, the Court held that after a 14-day break in custody the police may ask an accused to waive his Miranda right to counsel

[68] 468 U.S. 897 (1984).
[69] Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).
[70] U.S. v. Mahan, 190 F.3d 416 (6th Cir. 1999).
[71] 451 U.S. 477 (1981).
[72] Id.
[73] Arizona v. Roberson, 486 U.S. 675 (1988).
[74] Minnick v. Mississippi, 498 U.S. 146 (1990).

even though he has previously invoked his Miranda right to counsel while in custody.[75] Additionally, lawful imprisonment imposed upon the conviction of a crime does not create the coercive pressures identified in Miranda, and therefore it does not constitute custody for Miranda purposes.

The Court noted that the Edwards rule was to "prevent police from badgering a defendant into waving [sic] his previously asserted Miranda rights."[76] McWhorter's situation was more similar to Shatzer, as he was questioned more than four months after he invoked his right to counsel. Although he was in custody, it was for a totally separate offense, however. He was given and waived Miranda in each of the interviews, and as such, both were admissible.

After addressing a number of other procedural issues, McWhorter's convictions were affirmed.

ARREST

Nolan v. Jenkins (Sheriff) 2013 WL 69262 (6th Cir. 2013)

FACTS: Nolan lived in Chesterhill, Ohio for five years. She was charged with violations of the nuisance code over the upkeep and appearance of the property. She did not pay the fine or respond and was ultimately held in contempt. She was offered the opportunity to purge the contempt by paying the fines. She was ordered to be provided with a list of the violations and given information about appealing those corrections. However, the village did not give her the list for some weeks and did not meet with her as scheduled. She did not fix the violations or pay the full fine, but did began making payments before the assigned date.

A warrant was issued for her arrest, and she was subsequently arrested. She was not, however, given any paperwork authorizing her arrest until 8 days into her 10 day sentence. She filed suit under 42 U.S.C. §1983. The District Court ruled in favor of the Sheriff and Village defendants, and appealed.

ISSUE: Does a facially valid warrant justify an arrest?

HOLDING: Yes

DISCUSSION: The Court noted that "an arrest pursuant to a facially valid warrant is normally a complete defense to a federal constitutional claim for false arrest or false imprisonment."[77] The Court agreed that there was, in fact, a valid warrant for her arrest, that was duly signed by the arresting officers on the date in question. The Court noted that she argued she was never shown the actual warrant, but she failed to present any evidence that the warrant was valid.

[75] 130 S. Ct. 1213 (2010).
[76] McNeil v. Wisconsin, 501 U.S. 171 (1991) (quoting Michigan v. Harvey, 494 U.S. 344, (1990)).
[77] Voyticky v. Vill. Of Timberlake, 412 S.3d 669 (6th Cir. 2005).

Nolan also argued that it was unreasonable to issue the warrant without her knowledge, but the Court agreed she'd been given adequate notice and an opportunity to be heard prior to its issuance and was notified of her options.

The Court upheld the dismissal of Nolan's claims.

U.S. v. Clingman, 2013 WL 1316061 (6th Cir. 2013)

FACTS: In 2008, the FBI received information that a website, Radar.net, was being used to store and distribute child pornography. The site was based in California; it required users to provide an email address and phone number and then choose a screen name and password. To upload an image, the user would email it to an email address provided by the website and only a person with a password could post photos to the user's account. Photos so uploaded were time-stamped. The photos could be shared by the user with others by providing them with a "join code." All of this information was tracked by time, date and IP address. Special Agent Lies (FBI) identified a user page with the screen name "xcon28" contained child pornography. He connected that user name with an email address, a mobile email address and a cell phone number. Records linked all three to Clingman. (Clingman was a former convict, age 28, at the time.) In an email from the provided email address, the sender identified himself as "xcon28 from Radar."

IP addressed showed that user "had logged in repeatedly from several IP addresses." Two connected with locations where Clingman volunteered or studied, and where he had Internet access. Further, during times he was incarcerated, the account was inactive, with the exception of one apparent hacking attempt.

Clingman admitted he used computers at the two locations, and to his cell phone account. He admitted he'd uploaded adult pornography but not child pornography. He admitted to owning the account in question. He claimed to have sold the phone to a friend, Craun, a few months before. Craun stated he'd had the phone about three months and had a new number assigned to it when he bought it. Craun denied using it to access the Internet, but the browser history suggested otherwise, and further suggested that Clingman may have used the phone at that time to upload images.

During testimony, an agent testified that he saw one image of child pornography on the phone. Clingman objected, because that had not been disclosed prior to the trial. However, the judge allowed the testimony to stand.

Clingman was ultimately charged and convicted of transporting child pornography, he appealed.

ISSUE: May child pornographic images be produced by law enforcement for the defense?

HOLDING: No

DISCUSSION: The Court noted that there was disagreement as to whether the agent was ever asked if there was child pornography on the phone. Under the Adam Walsh Child Protection and Safety Act, Clingman (and his attorney) would not be allowed to have a copy of it.[78] They would be entitled to access to the phone, so long as it remained under the control of law enforcement, and that was, in fact, done. In fact, the prosecution did not intend to bring up the issue in the case-in-chief, at most, it was expected to be used in rebuttal, if at all.

The Court upheld Clingman's conviction.

U.S. v. Shaw, 707 F.3d 666 (6th Cir. 2013)

FACTS: Officers Cheirs and Robinson (Memphis PD) tried serve an arrest warrant on Brown. They had the address 3171, but could not find the house.

> They eventually found two houses on opposite sides of the street with a 3170 address, at which point, you might say, they were getting warmer. One of the houses presumably was mislabeled, and the officers had several options at their fingertips to figure out which house was 3171 Hendricks and which was not. They could have determined which side of the street contained odd-numbered addresses and served the warrant on the "3170" address on that side of the street. They could have checked city records or for that matter Google Maps to identify which house was the right one. Or they could have gone up to one of the houses and asked an occupant which house was 3171 Hendricks and which one was 3170 Hendricks.

The chose the last option, They saw that one house was occupied, so they started with that one. "Now they were getting colder." The woman that answered the door "promptly shut the door." With Officer Robinson in the rear of the house, Officer Cheirs continued to knock and after some minutes. The woman finally reopened the door. "Instead of asking the woman what the address of the house was, whether Phyllis Brown lived there or whether this was the odd-numbered side of the street, Officer Cheirs represented to the woman that he had a warrant 'for this address.' False. He had a warrant for 3171 Hendricks, and this was 3170 Hendricks."

"Having no reason to know that this representation was false," and failing to actually look at the warrant, the woman admitted them to the home of Brown's "hapless neighbor," Shaw. The officers did a protective sweep and found "a lot of cocaine." Shaw was arrested and charged with a battery of offenses. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: May officers lie to justify their presence at a location?

[78] 18 U.S.C. §35099(m)(2)(A).

HOLDING: No

DISCUSSION: First, the Court looked to whether the officers' belief that they were at the correct house and whether it was reasonable. The Court noted they had a "fifty-fifty likelihood of being false and when readily available alternatives could have confirmed" the correct location.

The Court detailed their reasons:

> The officers offer five potential reasons for entering Shaw's house to serve this arrest warrant, and none is reasonable—singly or cumulatively.
> Reason one: this house was occupied, and the other was not. But the occupation of a house at a given point in the day says nothing about its address or whether the object of an arrest warrant lives there. It is quite possible, indeed, that the opposite is true—that fugitives generally do not spend a lot of time at home.
> Reason two: a woman answered the door, and Phyllis Brown is a woman. Yet there were many people in the house, and the reality that one of them was a woman proves nothing. Of course, if the officers had looked at a picture of Phyllis Brown before serving this warrant, that could have confirmed or, as here, alleviated their suspicions when they met someone other than Phyllis Brown. As with other obvious options in this case—checking for the odd-numbered side of the street, checking city records, checking Google Maps—the apparent choice not to learn what Phyllis Brown looked like before serving this arrest warrant amounts to one more self-imposed shroud of ignorance that made other potential clues look more salient than they were.
> Reason three: the woman closed the door upon first seeing them. Perhaps the officers could think that this reaction showed the woman was up to no good, but it does not make her Phyllis Brown (particularly when the same woman returned to the door), it does not make the house 3171 Hendricks, and it does not by itself justify entry into the house. That is all the more so here. The officers had an arrest warrant for criminal trespassing, not drug dealing or something else that an occupant might wish to hide from the officer's view. The most law-abiding place for criminal trespassers to be is at home, on *their* property. The only people apparently trespassing that day were the officers.
> Reason four: the officers saw scales in the house. Ditto. This might be helpful if the officers could connect this observation to Phyllis Brown and the reason for her arrest. Yet this criminal-trespassing arrest warrant had nothing to do with drug dealing, and the officers do not claim that the observation of the scale gave them exigent circumstances to enter the house.
> Reason five: the officers had a fifty-fifty chance of being right, and that alone allowed them to take this approach. Yes, yes, and no. Yes, the officers had even odds of being right—at least as long as they refused to determine which side of the street contained odd-numbered houses. Yes, there was nothing wrong with going up to the house. But, no, officers may not say something is true —that they have an arrest warrant "for this house"—as a basis for obtaining entry into the house when there is a fifty-fifty probability that the statement Is false. That is all

> the more true when there are readily available means for alleviating most, if not all, doubt about the point, and when no officer-safety concerns justify the deception.[79]

The Court agreed that on occasion, "ruses and lies" are essential to law enforcement. But that does not permit "offices to tell an occupant that they have a warrant to make an arrest at a given address when they do not." They rolled the dice, and were wrong, "leaving them with having obtained entry into the wrong house based on a false pretense." The Court looked to Bumper v. North Carolina[80] in which it ruled that a search is not justified "as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant' when he does not." The court found no doubt they would have been denied entry had they told the woman who opened the door the truth.

The Court continued:

> This is not the only problem with the encounter. Just as the officers entered the house based on a hollow representation, they overstayed their stay based on one. After the officers falsely said they had a warrant for this address, the woman trustingly let them in. The officers saw five people in the front room, and one officer asked who lived there and who owned the property. The still-unidentified woman at the front door said she lived there, and so did one of the men. One of the occupants then asked, "[W]hat address y'all looking for?" R.52 at 36. An officer responded, "3170 Hendricks." False again. The apparent justification for this answer was the risk that, if the officers told them the truth—they had an arrest warrant for 3171 Hendricks—the occupants would "lie" and say that *this* was 3170 Hendricks. The officers were right about one thing—the proclivity for lying that day—as the occupants answered, falsely, that "this is 3171 Hendricks." Seizing on the answer, the officers claim that it gave them a definitive right to stay in the house. But the officers misjudged the impact of a false response to a false statement, what you might say was being too deceptive by half. The two falsities still left the officers with a false premise—that this was 3171 Hendricks. It was not.

The Court offered alternative wording that would have left "no one, truthful and deceptive alike, any room to maneuver." The Court found no custom in law enforcement training nor in Fourth Amendment law which allows officers to give a false answer when asked what right they have to be at a location.

The Court stated "the officers, in short and in truth, had no right to enter the house based on a falsity and no right to stay there based on a falsity." The Court further noted "there may be good candidates for taking a stand on the exclusionary rule, but this is not one of them."

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[79] See U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008).
[80] 391 U.S. 543, 546–51 (1968).

The plea was reversed and the case remanded.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Kinison, 710 F.3d 678 (6th Cir. 2013)

FACTS: On August 8, 2011, Omstott told Lexington officers that she believed Kinison, her boyfriend, "was potentially involved in criminal sexual activity with children." Det. Flannery enlisted help from Agent Kidd (FBI). She interviewed Omstott, who told her about disturbing text messages expressing a desire to engage in sex with children, and as a result, used forensics to "extract … text messages from her phone." Det. Barter, with Omstott's consent, downloaded over 1600 text messages, and were ultimately included in the subsequent search warrant. Omstott claimed that Kinison was viewing photos and video clips on his home computer.

On August 31, Det. Flannery got a warrant to search Kinison's home and electronics. While executing it, Kinison arrived. The officers saw his cell phone lying on the console of Kinison's vehicle and immediately obtained a second search warrant for the car. They seized a computer and cell phone from the hous, and the second cell phone from the car. All told, they found over 300 child pornography images and 40 videos.

Kinison was arrested and charged under federal law for possession of the material, under 18 U.S.C. §2252. He moved for suppression, which was granted. The Government appealed.

ISSUE: Is a known informant considered credible?

HOLDING: Yes

DISCUSSION: Kinison had argued that the warrant affidavit was insufficient to prove probable cause. The trial court "concluded that Omstott's statement to police was insufficient and that police should have corroborated several additional details in order for her statement to be credible and the affidavit to be sufficient." The Court noted, however, that it had previously "clearly held that a known informant's statement can support probable cause even though the affidavit fails to provide any additional basis for the known informant's credibility and the informant has never provided information to the police in the past."[81] In this case, the informant was possible a target for criminal prosecution as well!

The Court found the trial court to have erred in concluding that the police were required to do further investigation or corroborate her statements. Further, the Court agreed there was sufficient nexus between the evidence and the place to be searched, as it was reasonable to believe that the home and Kinison's personal electronics were where the evidence would be found. The Court noted that in previous child pornography

[81] U.S. v. Miller, 314 F.3d 265 (6th Cir. 2002).

cases, there had been a "piece of data (for example an IP address or a link between an email address and a provider) linking the individual to a computer, *none* of the aforementioned cases involved, as this case does, a credible known informant who was also the suspect's girlfriend, and who turned over evidence to police that inculpated both of them in a serious crime." This type of crime is generally carried out in the privacy of the home, and the evidence made a clear connection between the crime and the home.[82] The Court agreed the evidence should have been admitted.

The Court reversed the trial court's decision to suppress the evidence.

U.S. v. Carter, 2013 WL 1316390 (6th Cir. 2013)

FACTS: Between January and April, 2009, using a CI, Det. Wolff arranged for a cocaine base buy at a particular Chattanooga (TN) residence. Only two of the purchases were directly from Carter, but he was involved indirectly in others. The officer got a warrant for the address, referencing a John Doe as he was unaware of the true identify of one of the other individuals present. They were required to force entry to execute it and found another individual (Smith) trying to flush the drugs. Carter was present and was immediately secured. The officers found marijuana close to Carter and arrested him, then finding the keys to the residence and to a vehicle parked outside. When cocaine was found in the residence, he was charged with that as well.

Carter moved for suppression and was denied. He also moved for the identity of the CI and was again, denied.

Carter was eventually convicted (after his first trial mistried) and appealed.

ISSUE: Is a John Doe warrant to permit searches of all persons on a property valid?

HOLDING: Yes

DISCUSSION: Carter argued that that " his person should not have been searched by police unless he was committing a crime at the time of the search or he was named specifically in the warrant as a person to be searched." He maintained that Det. Wolff knew who he was and could have named him in the warrant. The Court ruled that simply listing a John Doe does "not render improper the search of any other individuals found in the apartment at the time of the execution of the warrant." The Court noted that the verbiage in the warrant authorized a search of "all persons … found within the curtilage" for cocaine.

In addition, the search of Carter's person did not occur until after marijuana was found in close proximity to him. Coupled with the officer's knowledge that he had made drug sales from the location, that arrest was proper. Once arrested, a full search was authorized.

[82] U.S. v. Paull, 551 F.3d 516 (6th Cir. 2009).

With respect to the CI's identify, the Court agreed that protecting the CI was justified, when necessary to further to aims of law enforcement. "The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."[83] The privilege is limited, however, when the disclosure of the CI's identify is "relevant and helpful to the defense." As such, the decision to order disclosure is a case by case one. In this situation, the Court noted the CI was still actively involved in cases, and was not a necessary witness in Carter's case. He was charged only based on what was found on the day of the search, not on earlier transactions involving the CI. Nor did he need the CI to identify the unknown individual ("Kip") as it was apparent that he already knew Kip's true name. Kip was also unnecessary to the case.

Carter's conviction was upheld.

SEARCH & SEIZURE – CONSENT

U.S. v. Perry, 703 F.3d 906 (6th Cir. 2013)

FACTS: In January, 2009, Tibbs returned home to his boarding house about 5:30 a.m. During the next few hours, Perry, another boarder, knocked on his door four times, the last time she brought a firearm and pointed it at him. Tibbs shut the door and called the police - Perry left the house. She returned that evening about 9 p.m. and was confronted by her landlord. She denied having pointed a gun, but "threatened to do just that as she walked upstairs." She pointed a gun at another resident, Dancy, thinking he'd called the police. By this time, police were on the way.

Officers Hendree and Parker arrived and talked to the residences. Both were armed, Hendree with a shotgun and Parker with a handgun. She complied with their orders and was handcuffed. She said she had no gun but admitted to having been drinking. Her door stood open nearby and they asked for consent to search. (This was witnessed by occupants.) Parker went in and called for Hendree, who spotted a revolver "sticking out from under a pillow." Hendree's report later indicated that he found the gun during a protective sweep – not mentioning the consent.

Perry, a felon, was charged with the gun. She argued that it was located during an unlawful search. The trial court ruled that it was a consent search or a protective sweep, and that either supported the search.

Perry took a conditional guilty plea to possession of the firearm and appealed.

ISSUE: May a drunk, handcuffed subject give a valid consent?

HOLDING: Yes

[83] Roviaro v. U.S., 353 U.S. 53 (1957).

DISCUSSION: Perty argued that she did not consent. The Court agreed that one witness was ambiguous in his statement, but that three others testified that she did give consent. She then argued that the consent was not voluntary and the Court agreed that there were facts suggesting that was the case – as she was handcuffed, drunk and never told that she could refuse. However, the Court then noted that "she was no stranger to the police or the criminal justice system" and had been arrested (and presumably handcuffed) 57 times before. The "encounter with the officers in the hallway was brief, without any repeated questioning or physical abuse." The Court agreed that her consent was voluntary and upheld her plea.

U.S. v. McCormick, 2013 WL 979132 (6th Cir. 2013)

FACTS: On October 1, 2010, Smith (McCormick's girlfriend) called police to report a domestic assault. She reported he had several guns in his home even though he was a convicted felon. Officers went to the home and knocked. McCormick answered, appearing drunk, but had no trouble talking to the officers. McCormick asked to go back inside and was instructed to stay on the porch. At that point, McCormick said "let's go in and talk about it" and walked back inside. The officers followed. He walked "through the living room, through the kitchen, and into a hallway by a bedroom." Officer Steward ordered him to stop and was ignored. Steward grabbed McCormick; he was handcuffed and taken outside. Officer Moore spotted "what appeared to be a rifle at the end of the hallway," but when he looked closer, he realized it was a BB gun. However, he then noticed three guns poking out from under a bed. Officer Moore extracted the guns, then seeing a fourth long gun.[84]

McCormick was indicted for being a felon in possession. He moved for suppression and was denied. He then appealed.

ISSUE: Does an invitation to come inside and talk constitute a consent to an entry?

HOLDING: Yes

DISCUSSION: The Court agreed that McCormick's actions constituted a consent to the officers entering his home. McCormick argued that Steward tased him, but the Court noted he had not a single piece of evidence corroborating that claim. The Court also agreed that his consent was voluntary.

McCormick also argued that under Kentucky law, he was permitted to own the long guns, because when he was released (1996) he was only told he could not possess handguns. The Court noted that he could not rely on the representation of a state officer with respect to federal law.[85]

[84] He found two shotguns, a rifle and a combination rifle/shotgun.
[85] Called entrapment-by-estoppel.

McCormick then argued that the evidence was insufficient to support the charge. To satisfy the elements of 18 U.S.C. §922(g)(1), the prosecution needed to prove that McCormick had a prior felony conviction (he had at least two), that he knowingly possessed the guns and that the guns had been made outside Kentucky (in interstate commerce). The Court agreed that the requirements were satisfied.

McCormick's conviction was upheld.

SEARCH & SEIZURE – EXIGENT ENTRY

U.S. v. Daws, 711 F.3d 725 (6th Cir. 2013)

FACTS: Deputy Sheriffs (Henderson, TN) responded to an armed home invasion in 2010. The victim recounted that Daws had taken money at gunpoint and warned that if the victim called the police, he would be killed. As that interview ended, the deputies got another call about Daws, the caller claimed that Daws and a second person had arrived "with a bundle of money" and wanted to hide a shotgun (the weapon used in the first crime.) The deputies were very familiar with Daws and "resolved to do two things: promptly apprehend Daws and be careful, the last of which prompted them to don body armor, call for backup and approach Daws's rural house quietly." They found a friend of Daws outside, crying, and they heard him confess to someone on the phone that he and Daws had "done something bad" and would be going to jail. The friend was apprehended. The deputies entered and found Daws inside the house. During a protective sweep, they found a shotgun.

Daws, a felon, was charged with possession of the gun. He took a conditional guilty plea and appealed.

ISSUE: Does a person making threats justify an exigent entry?

HOLDING: Yes

DISCUSSION: The Court agreed that the officers had ample reason to justify a warrantless entry; "the gravity of the crime being investigated, the likelihood that the suspect is armed and the suspect's willingness to use a weapon."[86] The Court agreed that given what they knew, "even the most reticent officer could be forgiven for taking matters into his own hands – and for halting an escalating set of risks." The delay inherent in getting a warrant "would have heightened the risk that Daws would act on the threats" he was making. The Court agreed that Daws's actions "gave officers … reasons to believe they faced an immediate risk." The Court agreed that the deputies faced a real risk that Daws would open fire on them.

The Court agreed their entry was justified and upheld the plea

[86] Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555 (6th Cir. 2006).

SEARCH & SEIZURE – SEIZURE

U.S. v. Vaughan, 2013 WL 174219 (6th Cir. 2013)

FACTS: Vaughan was arrested in Tennessee when Agent Richardson (TBI) told Trooper Kilpatrick that Vaughan would be delivering marijuana to a restaurant parking lot and that the trooper was to "develop probable cause" for a stop. When the trooper saw that Vaughan was not seatbelted, he made the stop. He found Vaughan with bloodshot eyes and smelling of burnt marijuana. Trooper Dunkleman arrived with his drug dog. As Trooper Kilpatrick wrote the citation, Vaughan denied consent to search. However, the dog alerted and the vehicle was searched anyway. Vaughan was not arrested, but was secured in the back of the trooper's vehicle. They found $19,000 in cash and other suspicious items. Agent Richardson arrived and gave Vaughan Miranda rights. He was arrested, convicted and appealed.

ISSUE: Is someone held locked in a patrol car under arrest?

HOLDING: Yes

DISCUSSION: The District Court had agreed that at the time he was placed in the car, Vaughan was under arrest, as his cell phone had been confiscated, he was secured in a patrol car next to a caged dog and he was told he was detained and not free to leave. He was held for approximately 1 ½ hours. However, the Court agreed that his detention at that time was supported by sufficient probable cause for an arrest.

Vaughan's conviction was affirmed.

U.S. v. Young, 707 F.3d 598 (6th Cir. 2013)

FACTS: On December 15, 2006, at about 1:15 a.m., Young was reclining in the passenger seat of a vehicle parked outside a Grand Rapids, MI, restaurant. It was parked in a city-owned lot regularly used by the restaurant patrons. The area "had a recent history of violent crime." Since the restaurant patted down patrons, officers considered people waiting outside to be more likely to have a weapon, and in addition, they were on the lookout for loitering in violation of city ordinance.

Officers Fannon and Johnson pulled into the lot and parked behind the vehicle. They watched him and then approached, along with Officer Loeb. After a pause, Young rolled down the window. He answered the questions asked about what he was doing, stating that his friend had gone inside to ask about a table or take-out. The friend, Eric, was approaching the vehicle and was instructed to go back inside. Young was told to "sit tight." Officer Johnson proceeded to run a records check on Young. Young was told that he was not allowed to just sit in the car. Due to Young's suspicious movements, Officer Fannon told him to keep his hands visible. When Young didn't comply, he was told to get out. Young did so, but "disclosed that he had a gun in his pocket." He was secured, frisked, and the gun seized. Young was then discovered to have an outstanding arrest warrant.

Young, a felon, was charged with possession of the firearm. He moved for suppression and was denied. Young took a conditional guilty plea and appealed**.**

ISSUE: Does the discovery of an arrest warrant remove the taint of an otherwise unlawful detention?

HOLDING: Yes

DISCUSSION: Young argued that "he was seized when the officers parked behind him, or, at least, when the officers told him to 'sit tight.'" At the time, he was at most possibly merely trespassing, and that was not enough reasonable suspicion to support the seizure. Once he explained his purpose for being there, seizure was not appropriate.

The Court noted that the record was unclear as to whether Young's vehicle was actually blocked in by the police but the Court assumed it was. "The presence of three officers shining flashlights into the car and authoritative instructions from Officer Fannon also suggest that a reasonable person would not have felt free to leave anytime thereafter." The Court looked for sufficient indicators to support a Terry stop and noted that the "high-crime history of the parking lot" and their knowledge that the restaurant patted down patrons were "contextual factors, not specific to Young." Such factors are not to be given much weight "because they raise concerns of racial, ethnic, and socioeconomic profiling." In addition, the Court noted that trespassing is, in itself, a crime. His position in the car, reclined and possible asleep, indicated he was "going nowhere." Initially, the officers lacked Young's explanation for being there. The Court agreed the initial contact was supported by reasonable suspicion.

The Court moved on to whether the scope was reasonable. The Court noted that once they obtained his ID, it was inevitable, no matter what else occurred, that they would have discovered the outstanding warrant. The Court agreed that "running a warrant check is not the quickest way to 'confirm or dispel suspicion' of trespass, nor is it the 'least intrusive means' of investigation."[87] Other circuits have noted that running a warrant check is not necessarily improper as it "may help clear the person's name or may give the officers important information about the suspect." Because the check is reasonable, the "inevitable product of that check, the gun, is the fruit of a legal seizure."

The Court affirmed the denial of the motion to suppress.

SEARCH & SEIZURE – VEHICLE EXCEPTION (CARROLL)

U.S. v. Johnson, 707 F.3d 655 (6th Cir. 2013)

FACTS: On January 11, 2010, Officer Parks stopped Johnson for a seat belt violation. He smelled marijuana from inside and spotted a license plate on the back

[87] U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).

seat. The female passenger admitted to having just smoked marijuana. She provided false information initially. Johnson asked to speak to Officer Parks and told him he knew he would be arrested because he was under a condition of release to stay away from the passenger. He also admitted to being a convicted felon and that there was a gun under the passenger seat. The officer confirmed the passenger's true identify and also that Johnson had an active arrest warrant.

Johnson was indicted for being in possession of the weapon. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Does the odor of marijuana justify a Carroll search?

HOLDING: Yes

DISCUSSION: Among other issues, Johnson argued that the search of his vehicle was not valid to a lawful arrest. The Court noted that he did not challenge the actual stop, and that "an officer's detection of the smell of marijuana in an automobile can by itself establish probable cause for an arrest."[88] In addition, he volunteered that he was a convicted felon and that there was a gun in the car. The Court held the search was valid.

In addition, the Court agreed that his prior conviction, for Stalking 1st degree, was a violent felony and as such, could be used against him to satisfy the requirements of the Armed Career Criminal Act, enhancing his sentence.

SEARCH & SEIZURE – DOG SNIFF

U.S. v. Patton, 2013 WL 949481 (6th Cir. 2013)

FACTS: On November 28, 2009, officers responded to a break in in a Knoxville home. The 911 caller reported that the intruder was her ex-boyfriend, Patton, and described his vehicle. As an officer arrived, he spotted the described vehicle and stopped it. Patton got out, locking the car behind him. He was handcuffed.

Additional officers arrived, as well as a drug dog. The dog alerted to the vehicle. An officer asked Patton for the keys, which he eventually produced. He then stated that there was a gun in the car. The officer found a handgun and ammunition. Patton, a convicted felon, was charged with the possession of the gun. He moved for suppression, which was denied. He then took a conditional guilty plea and appealed.

ISSUE: Is a dog alert enough for probable cause for a search?

HOLDING: Yes

[88] U.S. v. Bailey, 407 F. App'x 27 (6th Cir. 2011) (quoting U.S. v. Elkins, 300 F.3d 638 (6th Cir. 2002)). See also Carroll v. U.S., 267 U.S. 132 (1925).

DISCUSSION: Patton argued that the search was unlawful. The Court agreed that the initial stop was justified under Terry v. Ohio.[89] Patton argued that since he was in custody at the time of the search, and that there were no exigent circumstances present, it was unlawful as a search incident to the arrest. The Court noted, however, that was not the nature of the search, which was instead justified by the drug dog's alert.[90] In its most recent review of a dog sniff case, Florida v. Harris, the Supreme Court "reaffirmed that the long-standing 'totality-of-the-circumstances' approach is all that is required to support a narcotics dog's reliability to detect drugs during a search." In this case, the record "amply supports" the Court's conclusion that the dog's alert provided probable cause to search the car.

Patton's conviction was affirmed.

SEARCH & SEIZURE – SCHOOLS

Hearring v. Sliwowski (Metro Nashville Gov't), 712 F.3d 275 (6th Cir. 2013)

FACTS: On October 27, 2009, B. H. (Hearring's daughter) complained of genital irritation and pain on urination. Hearring was contacted and called back, reporting her daughter had a history of chronic bladder infections. Two days later, her daughter complained again, and she was directed to wait for the school nurse. The school secretary called Hearring again, leaving a message. Sliwowski and Back (a staff member) took the child to the restroom and directed her to remove her clothing for examination. Sliwowski examined her genitals visually but did not touch her. Under school rules, however, such an examination was not permitted without parental consent, which they did not have.

Hearring filed suit against Sliwowski. The Court agreed that Sliwowski was not entitled to qualified immunity, and she appealed.

ISSUE: Is a physical search by a school official of a small child lawful for medical reasons?

HOLDING: Yes (but see discussion)

DISCUSSION: The trial court ruled that prior precedent "made clear that 'ordinary common sense' puts school administrators on notice that a search of a student's naked body" was highly inappropriate during a search for contraband. This case, however, was different, in that it was an attempt to determine a medical condition. The Court agreed there was no direct precedent, but related it to cases involving paramedics, in which it was implied "that there may be some circumstances in which the provision of incompetent medical assistance is not actionalble under the Fourth Amendment.

[89] 392 U.S. 1 (1968).
[90] Illinois v. Caballes, 543 U.S. 405 (2005); U.S. v. Reed, 141 F.3d 644 (6th Cir. 1998); U.S. v. Diaz, 25 F.3d 392 (6th Circ. 1994).

The Court ruled that "existing precedents did not give Sliwowki fair warning that her medical assessments" implicated the Fourth Amendment. The Court reversed the denial of summary judgement.

G.C. v. Owensboro Public Schools, 711 F.3d 623 (6th Cir. 2013)

FACTS: In 2008, G.C. was enrolled as an "out of district" student in Owensboro. (Normally, he would have been expected to attend a school in Daviess County.) G.C. had been subjected to discipline for misbehavior several times prior to the final incident. In spring, 2009, G.C. left the school without permission and was found with tobacco, Assistant Principal Smith brought him in and told him she was concerned that he was thinking about suicide again. He entered a treatment center later that day. Ultimately, he was suspended and at the end of the school year, a meeting was held to discuss whether he could continue at the school. He was registered for the next school year using his grandparents' Owensboro address, but his parents agreed at the same time that he still lived outside the city.

On September 2, 2009, G.C. violated school policy by texting. His phone was seized and brought to Assistant Principal Brown, who read the text messages – she later said she was concerned that he might be planning to harm himself. The Principal, Vick, agreed that his out of district privilege should be revoked and it was.

G.C. filed suit, arguing that his rights to an education, and under the First and Fourth Amendment, were violated. The District Court ruled in favor of the school and G.C. appealed.

ISSUE: May a student's cell phone be searched without probable cause?

HOLDING: No

DISCUSSION: G.C. argued that the search of his cell phone in September, 2009 "was not supported by a reasonable suspicion that would justify school officials in reading his text messages." (He conceded a similar search in March, 2009, was justified based upon a concern that he might harm himself.) The Court looked to New Jersey v. T.L.O., in which the Court had "implemented a relaxed standard for searches in the school setting."[91]

The Court noted that ""a student search is justified in its *inception* when there are reasonable grounds for suspecting that the search will garner evidence that a student has violated or is violating the law or the rules of the school, or is in imminent danger of injury on school premises."[92] Such searches must be "reasonably related to the objectives of the search and not excessively intrusive …." The Court noted that it had yet to address a school cell phone search and looked to District Court rulings on the

[91] 469 U.S. 325 (1985)
[92] Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489 (6th Cir. 2008).

issue. The Court noted that broad language in some of those cases did not "comport with [its] precedent."

The Court continued:

> Such broad language, however, does not comport with our precedent. A search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. Not all infractions involving cell phones will present such indications. Moreover, even assuming that a search of the phone were justified, the scope of the search must be tailored to the nature of the infraction and must be related to the objectives of the search. Under our two-part test, using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction. Because the crux of the T.L.O. standard is reasonableness, as evaluated by the circumstances of each case, we decline to adopt the broad standard set forth by DeSoto and the district court

The Court looked specifically to the case of Klump v. Nazareth Area School District,[93] in which a seized phone was searched for text messages and voice mail. The phone was also used to call other students and to text the student's brother. The District Court had found that seizing the phone was proper, as it was being used in violation of the school rules, but that it was not proper to go beyond that. Even though incriminating text messages were found, there was "no justification for the school officials to search [the] phone for evidence of drug activity."

The Court disagreed that a "general background knowledge of drug abuse or depressive tendencies, without more, enables a school official to search a student's cell phone when a search would otherwise be unwarranted." They had no reason to believe at the time of the September search that he was engaging in any unlawful activity or contemplating suicide or injury. The Court agreed the search of the phone was unreasonable.

Further, although there was no proof of any damages to G.C. as a result of the search, the Court agreed that the possibility remained he might be entitled to nominal damages, at the least.

The Court reversed the case with respect to the cell phone search.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Campbell, 2013 WL 85800 (6th Cir. 2013)

FACTS: On January 20, 2010, Campbell was pulling over for speeding by Officer Duggan (Chattanooga PD). The officer noted the "strong smell of air freshener" and

[93] 425 F. Supp. 2d 622 (E.D. Pa. 2006).

Campbell lowered the rear window. He provided his vehicle papers, but Campbell's hands were shaking and he was nervous. While waiting for a records check, the officer began writing a citation. Duggan was told that he'd previously fled from a traffic stop while on a trip from Atlanta to West Virginia, his stated route this time, and Officer Duggan called for backup. He learned Campbell had nothing outstanding but did have a "significant drug- and weapons-related criminal history in three states." He found suspicious that Campbell asked him what county they were in and the name of a nearby mall. Duggan asked consent to search and was denied.

During that time frame, Officer Duggan deployed a drug dog, which hit on the vehicle. Narcotics were recovered. Roughly fifteen minutes passed from the time of the stop and the alert.

Campbell was charged and moved for suppression of the evidence, and of the "subsequent inculpatory statements he made after being informed of his Miranda rights." The District Court denied the suppression motion. Campbell took a conditional guilty plea and appealed.

ISSUE: May a traffic stop be extended with reasonable suspicion?

HOLDING: Yes

DISCUSSION: Campbell argued that Officer Duggan impermissibly extended the duration of the stop, but Campbell argued that they were, in fact, still working on the citation when the dog was deployed. The Court found that the time frame was not excessive, even if it went a bit longer than the usual traffic stop. The Court agreed that even though he'd gotten a clear records check, the officer had additional reasonable suspicion of criminal activity. Under the totality of the circumstances, the Court agreed that the traffic stop was proper.

Campbell's plea was upheld.

U.S. v. Atkins, 2013 WL 425546 (6th Cir. 2013)

FACTS: At about 12:45 a.m., on August 12, 2010 Officer Blow and Good (Lansing, MI, PD) responded to a brawl outside a club. Allegedly, "one of the combatants brandished a handgun." A description of the subject and his vehicle was put out, and the officers searched for it. Finding a vehicle that matched the description, they made a stop and had all of the occupants get out. The occupants were frisked and secured in separate vehicles. The lone male in the vehicle, Atkins, was wearing clothing that matched the description, and he had blood on the shirt, facial injuries and admitted to having just left the club. Officer Good searched the passenger compartment and found a handgun in the center console. Atkins was arrested and taken for treatment but managed to flee the hospital.

Atkins was arrested five months later, after police received a tip. He tried to run with a duffel bag but was caught. The bag contained handguns, a rifle, body armor and explosives. Atkins was charged with possession of the weapon and the body armor.

He moved for suppression, arguing that the initial stop was unsupported by reasonable suspicion. The Court denied the motion. Atkins was tried, convicted and then appealed.

ISSUE: Do minor discrepancies in description of a suspect vehicle invalidate a traffic stop?

HOLDING: No

DISCUSSION: Atkins did not protest the search of the vehicle, only the initial stop. The Court agreed that the facts provided sufficient reasonable suspicion to support the stop, despite some conflict about the actual color of the vehicle (silver vs. "tannish"), given that it contained occupants that matched the reports (2 women and a man, and the clothing worn by the man). The Court upheld the denial of the motion to suppress, and Atkins' conviction.

42 U.S.C. 1983 – ARREST

Meakens v. Benz, 2013 WL 560329 (6th Cir. 2013)

FACTS: Meakens and Chisholm (married) were living together in Meakens' Cleveland home in September, 2010. Early the next spring, she threw him out of the house and filed for divorce. On February 18, 2011, Chisholm called police, stating that Meakens had shot at him from her nephew's car. Officers responded and took a report. Eventually, detectives, including Benz, took a sworn statement. He learned that each had been calling the police about the other for the previous two months. He also learned that Meakens had filed domestic violence complaints against Chisholm and that a beat officer had heard gunshots in the area prior to Chisholm's call. An arrest warrant was obtained and Meakens arrested.

Meakens provided Benz with alibi information, showing that she was in Chicago at the time in question. However, she was indicted. Chisholm notified Benz he was moving out of state and all charges were dropped within weeks.

Meakens filed suit against Benz. The District Court granted him summary judgment and Meakens appealed.

ISSUE: Does probable cause negate an action for a false arrest?

HOLDING: Yes

DISCUSSION: The Court agreed that an arrest warrant is valid only if supported by probable cause. Meakens argued that probable cause did not exist for the warrant "because of Chisholm's lack of credibility." Benz noted that Chisholm's information was consistent with other known facts. She also argued that her alibi negated "any other inculpatory evidence." However, the Court agreed that Benz was "under no obligation

to give any credence" to her story since the initial facts provided probable cause. Benz argued that he did not find her proferred documents about her alibi to be persuasive. The Court agreed that although the detective "could have conducted a more thorough investigation," it was sufficient to provide probable cause.

The Court upheld the dismissal of Meakens' action.

Autrey v. Stair / Kennedy (Detroit PD) 2013 WL 331560 (6th Cir. 2013)

FACTS: At about 2 a.m. on April 28, 2007, Officer Chuney (Detroit PD) responded to an vehicle accident. He learned one of the vehicles was an unmarked car registered to the PD. He learned that a commander, Bettison, had been driving it, and knew that Bettison was a close friend and fundraiser for the Mayor. Officer Chuney surveyed the car, finding an empty wine cooler bottle inside and three outside the car. He did not fill out the report, instead telling the other police officials who responded to the scene what had happened. He did discuss with three officers the bottles, however. Sgt. Hayes, his supervisor, did not find it necessary to separately secure the bottles as evidence since the entire scene was taped off. Sgt. Hayes reported this to the lieutenant, who ordered him to go to the hospital with Bettison. Messages went "up and down the relevant chains of command" as to what had happened. Eventually command staff, including Stair and Kennedy, convened at the hospital and were told that alcohol may have been involved.

Deputy Chief Logan directed Commander Serda "to evaluate the situation at the site of the accident." Commander Serda responded to the scene and noted that there was no tape around the bottles specifically, but felt that the crime scene at the nearby intersection was sufficient. Logan and Autrey tried to talk to Bettison, but were thwarted because he was sedated and unconscious. They learned that Bettison had been drinking and was "obviously over the legal limit." Autrey later claimed that Logan had said the accident site was no longer a crime scene and that IA was not coming out. He decided to go check on the car for personal items. He observed two police cars still there, blocking the road, but no crime scene tape present. He removed a car seat and a flashlight, as well as the empty wine cooler bottles. He ultimately threw away the bottles.

Sgt. Kennedy, however, of IA, did arrive at the site, responding to a call from Commander Stair, a short time later. He also saw no tape but observed that the car was being prepared to be moved by the tow truck. He found the top of an alcoholic beverage container bottle (apparently a screw top from one of the coolers) and with that, served an investigative subpoena for the blood alcohol results at the hospital. It proved to be at .22, and Bettinson later admitted to having had several alcoholic beverages that night. As a result of later discussion, Sgt. Kennedy and Commander Stair decided that Commander Autry did remove the bottles, necessitating a report to that effect. An amended report was drafted, with a recommendation that Autrey be charged with criminal offenses related to tampering with the evidence and related crimes. The prosecutor specifically did not want to know what Autrey's statement

about what had occurred said, as he didn't want to involve Garrity issues.[94] Following a preliminary hearing, Autrey was bound over for trial.

At trial, Autrey was acquitted. He then filed a lawsuit under 42 U.S.C. §1983 against a number of police defendants. The Detroit defendants moved for summary judgment following extensive discovery, which was granted. During the process, Autrey dropped all claims against everyone but Sgt. Kennedy and Commander Stair. Autrey appealed only the dismissal of his claims against those two.

ISSUE: Does a malicious prosecution lawsuit require proof of lack of probable cause?

HOLDING: Yes

DISCUSSION: The Court noted that since the Michigan trial court had ruled that probable cause existed to bind Autrey over for trial, the "principles of collateral estoppel precluded [Autrey] from pushinging a second time an identical challenge to the quantum of evidence necessary to initiate a criminal prosecution." Further, the Court noted, there was no evidence that the pair "provided false information or failed to provide material exculpatory information" to the prosecutor. Each of Autrey's claims, malicious prosecution and wrongful arrest, require, as an element, a "lack of probable cause to pursue the particular action." Collateral estoppel applies when "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment," the "same parties … had a full [and fair] opportunity to litigate the issue," and there is "mutuality of estoppel." The last element is not necessary when the defense is being "asserted defensively to prevent a party from relitigating an issue" that has previously been litigated to its conclusion.

The Court agreed that even though he was acquitted at trial, the trial court had concluded that there was probable cause to bring the case. The court agreed that a cause of action might proceed if there was evidence of deliberate falsehoods or the omissions of crucial information before the trial court, but that requires more than mere allegations. The omitted information did not contradict any of the information that indicated Autrey improperly removed items from the scene. Parsing the language in the reports, the Court noted that although certain terminology might not be precise, it does not equate to a falsehood or misstatement. Further, even though the bottles were not essential to the case against Bettison, they "would've been nice to have," according to Sgt. Kennedy.

The court agreed that collateral estoppel precluded the §1983 case. The District Court's decision was upheld.

[94] Garrity v. New Jersey, 385 U.S. 493 (1967).

Garcia v. Thorne, 2013 WL 1136552 (6th Circ. 2013)

Facts. On March 17, 2008, Mason (MI) police responded to a break in at a home. Smith, Garcia's 15 year old son, became a suspect. Officer Thorne obtained an arrest warrant for Smith, which was authorized a few days later. Thorne called Garcia's phone numbers attempting to contact her – she later claimed that he called at "inappropriate hours" – in the middle of the night. He was apparently trying to get a current address for her. At some pointed, however, he learned she'd moved to Lansing. Thorne had a previous history with Garcia and characterized her as "anti-police."

A short time later, Garcia visited Smith's high school to talk about his absence. She explained that there was a warrant for his arrest so she saw no reason for him to attend school. A few days later, Thorne talked to Smith, who agreed to turn himself in the next day, but Garcia called the department and told them that Smith would not be doing so and again complained that Thorne had been calling. During the next night, Garcia claimed Thorne called her and threatened her with criminal charges. The next morning, Thorne requested a warrant for Garcia for harboring a felon but instead, the prosecutor issued a truancy warrant for her. Lansing PD executed the warrant and transferred her to Mason, Smith was arrested the following day.

The prosecutor filed a nolle prosequi and dismissed the truancy charges. Garcia filed suit against Thorne under 42 U.S.C. §1983, arguing false arrest, malicious prosecution and related claims. Thorne moved for summary judgment, which was granted, and Garcia appealed.

ISSUE: Do minor errors invalidate an arrest warrant?

FACTS: No

DISCUSSION: With respect to the false arrest claim, the court noted that Garcia "must show that [Thorne] lacked probable cause to arrest her."[95] Garcia did not dispute that she was harboring her son, but argued that Thorne should have known that as a juvenile, Smith would not be charged with a felony. The court noted, however, that under state law, Smith could have been waived to an adult court for his particular offense. Further, even though Thorne knew that Garcia (and Smith) lived in Lansing, and that his use of a Mason address on the warrant was incorrect, it was not material to the probable cause finding. The Court agreed that the mistakes were not material and that the arrest was valid.

With respect to his alleged calls during unreasonable hours, the Court noted that Garcia had produced no evidence substantiating the calls. However, the Court agreed that even if made, the calls "do not shock the conscience," which is a very high standard. At worst, they showed poor judgment. Neither does submitting a warrant with an arrest in his jurisdiction, as the warrant was validly served by Lansing police.

[95] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010) (citing Voyticky v. Village of Timberlake, Ohio, 412 F.3d 669 (6th Cir. 2005)).

Finally, the Court agreed that Thorne's request for charges against Garcia were not causally linked to her complaint about his phone calls, as he could show "he would have taken the same action in the absence of the protected activity [free speech]." In Hartman v. Moore,[96] the Court had held "that the lack of probable cause is highly probative, if not dispositive, of the existence of a retaliatory motive." The converse is also true, in that the "existence of probable cause indicates a lack of retaliatory motive."

The Court affirmed the dismissal of Garcia's claims.

Alman/Barnes/ Triangle Foundation v. Reed (and others), 703 F.3d 887 (6th Cir. 2013)

FACTS: At about 1 p.m., on October 12, 2007, Alman went to Hix Park, in Westland, Michigan. He parked his car, listening to the radio. He moved to a picnic table eventually. Deputy Sheriff Reed (Wayne County, MI, SO) approached Alman and "struck up a conversation." Deputy Reed was part of a multi-jurisdictional task force doing ongoing surveillance on the park, investigating "complaints of lewd conduct and possible sexual activity." Deputy Reed was the decoy in the detail on that day. At some point, Alman told Reed that he and his partner had just moved to the area, which led Reed to assume Alman was gay. Although there was dispute, at some point, "Alman began walking down a trail and Deputy Reed followed him." They ended up in a clearing and Alman later stated that "he believed that Reed was flirting with him." Alman went down on one knee after allegedly touching or brushing Reed's crotch. Reed then arrested Alman and he was taken back to the detail area. He was transported to jail and his vehicle towed.

The vehicle in question, however, belonged to Alman's partner, Barnes. Barnes travelled to Indiana and decided to pay a redemption fee ($900) in order to retrieve the vehicle. He signed a release that effectively negated any potential civil litigation regarding the car. When he went to retrieve the vehicle, however, the only person that could release it was not available, and would not be there for another four hours. Barnes contacted the Triangle Foundation, a LGBT advocacy organization. Finally, at about 6 p.m., he was able to retrieve his vehicle.

Ultimately, the charges against Alman were dismissed, but he was given an "appearance ticket" for violating two local ordinances. One charge was subsequently dismissed and when officers did not appear on the second one, at trial, it too was dismissed.

Alman and Barnes filed suit under several claims. The District Court dismissed the claims and Alman and Barnes appealed.

ISSUE: Must an arrest be based upon probable cause?

[96] 547 U.S. 250 (2006).

HOLDING: Yes

DISCUSSION: First, the Court discussed the existence of probable cause for the offenses charged. Under Michigan v. DeFillippo, the Court equated probable cause for an arrest with the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances show, that the suspect has committed, is committing, or is about to commit an offense."[97] The Court reviewed the elements of each offense and concluded that in none of them do the facts support probable cause for the arrest. As such, the Court reversed the dismissal on that claim.

Officers involved claimed qualified immunity, but because the District Court had concluded probable cause was present it had not ruled on that issue. Alman and Barnes only alleged constitutional violations against Sgt. Swope, who made the initial decision to charge Alman. Sgt. Swope admitted that he acted solely upon what he was told by Reed with respect to the allegation of touching. The Court agreed that "without more facts at his disposal, [Swope] had no reasonable basis to believe that any of the offenses that Alman was charged with had occurred or were about to occur." As such, the Court agreed qualified immunity was not appropriate.

With respect to at failure to train cause of action, the Court noted that the bar is high on such cases. It requires that the plaintiff prove that ""that a training program is inadequate to the tasks that the officers must perform; that the inadequacy is the result of the city's deliberate indifference; and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury."[98] Finding nothing to suggest that either employer (Wayne County for Reed, Westland PD for Swope) had any reason to be aware of a potential for constitutional violations due to inadequate training on enforcement of such charges. The court affirmed the dismissal of the case against the government employers.

Finally, the court looked at Barnes's claims regarding the seizure of his vehicle. The Court agreed that the "seizure of a vehicle in connection with an arrest not supported by probable cause violates the Fourth Amendment in the same manner that the arrest itself violates the Fourth Amendment." [99] Although there are exceptions, particularly with respect to temporary seizures, "the subsequent seizure of property based on the invalid arrest violates it as well." As it held that the arrest was invalid, the Court reversed the decision dismissing the claim regarding the vehicle. Barnes also claimed that the process used to seize the vehicle effectively extorted money from him but the Court did not agree.

The Court remanded the case for further proceedings on the reversed claims

[97] 443 U.S. 31 (1979); Devenpeck v. Alford, 543 U.S. 146 (2004).
[98] Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989) (citing City of Canton v. Harris, 489 U.S. 378 (1989)).
[99] See U.S. v. Place, 462 U.S. 696 (1983).

42 U.S.C. 1983 – SEARCH & SEIZURE – MEDICAL EMERGENCY

Stricker v. Twp. of Cambridge, 710 F.3d 350 (6th Cir. 2013)

FACTS: On December 22, 2008, Susan Stricker called local (Cambridge) and state officers "requesting help for her son, Andrew, who was suffering from an apparent drug overdose." Consistent with policy, the officers were sent to secure the premises for EMS. (In fact, officers were familiar with Andrew and his brother William, both known to be heroin addicts.) Susan and Kevin (her husband) refused to allow the officers to enter without a warrant. Stricker told them that she no longer wanted medical help for Andrew and she ultimately called the Michigan State Police to try to get the local officers off the property. However, she refused to answer the door to the state trooper who responded, either. At that point, deputy sheriffs arrived. Andrew was presented to the officers, through a window and the trooper later testified that Andrew was pale and did not appear to be alert or focused. After further discussion, and consultation with the local prosecutor, the officers forced their way in, "conducted a search of the house, and placed Andrew's parents in handcuffs while EMS administered care to Andrew." He was transported and ultimately arrested for using narcotics. The Stickers were arrested for various state charges.

The Strickers, along with additional members of the family, sued a number of law enforcement officials from Cambridge Township, Lenawee County Sheriff's Office and the Michigan State Police for the entry and detention. The District Court denied all claims, finding exigent circumstances justified all of the actions taken at the scene. The Strickers appealed.

ISSUE: Is an exigent entry permitted based upon a probable medical emergency?

HOLDING: Yes

DISCUSSION: The Court noted that one "well-recognized exception applies when the 'exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'"[100] "Circumstances in which it is objectively reasonable to believe a medical emergency exists fit within the exigent circumstances exception." [101] The court looked to several cases for guidance in "what constitutes a medical emergency."[102] The Court agreed that "the combination of [a] 911 call, the uncertain nature of the emergency, and the need to safeguard EMS while tending to the [victim] made for exigent circumstances." The Court continued:

> Viewed in the light most favorable to the Strickers, the combination of the 911 call soliciting help for a drug overdose, the police's independent knowledge and

[100] Kentucky v. King, 131 S. Ct. 1849 (2011) (quoting Mincey v. Arizona, 437 U.S. 385 (1978)).
[101] Brigham City v.Stuart, 547 U.S. 398 (2006),
[102] See Michigan v. Fisher, 558 U.S. 45 (2009); Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003); Johnson v. City of Memphis, 617 F.3d 864 (6th Cir. 2010).

> observations confirming the reported overdose, and the Strickers' attempts to prohibit access to Andrew despite their initial call for help made it objectively reasonable for the officers to believe that Andrew was overdosing on drugs and was in need of immediate medical evaluation and attention.

The court found it to be "clear that it was objectively reasonable for the officers to believe a medical exigency existed when they had affirmative evidence that someone in the home needed immediate aid." The court found it significant that the Strickers also "barred all access to Andrew by refusing requests for him to leave the house to be treated."[103]

With respect to the duration and scope once the officers admitted, the Court agreed that Andrew was not immediately within view when the officers entered. As such, they were justified in looking for him. Further, they were justified to sweep the location in over to protect themselves and the EMS crew, particularly given that they had "repeatedly inhibited" access to Andrew by EMS.

Finally, the court found the issue of the more extensive search of the was a close call, but because it was reasonable for the officers to believe Andrew was in a drug overdose, it was reasonable to search for what he may have ingested in order to aid in treatment. [104] With respect to the arrest, the Court agreed that the officers had probable cause to believe that the Strickers had "resisted and obstructed officers," violating Michigan statute. They argued the commands were unlawful, but the Court disagreed. Nor did the Court agree that the force used, holding them at gunpoint, having them lie on the floor and handcuffing, was excessive under the circumstances.

The Court affirmed the District's Court's dismissal of the action.

42 U.S.C. 1983 – FAILURE TO TRAIN

Essex (and others) v. County of Livingston, (MI) 2013 WL 1196894 (6th Cir. 2013)

FACTS: In early 2008, Deputy Boos (Livingston County SO) sexually assaulted five women "while transporting them from the Livingston County Jail to the county courthouse." He was ultimately charged with sexual crimes and pled guilty. During the subsequent lawsuit against the County and Sheriff Bezotte, Boos argued that "he did not know his acts were criminal because he believed [them to be] consensual." He claimed to be unaware that Michigan law was that no "inmate or detainee could … provide valid consent" and that he "never received training on sexual assault or the proper conduct in transporting detainees." He acknowledged that he was generally aware it was wrong, however. Sheriff Bezotte had not implemented any special training for his deputies as "he believed it was common sense."

[103] Brooks v. Rothe, 577 F.3d 701 (6th Cir. 2009).
[104] McKenna v. Edgell, 617 F.3d 432 (6th Cir. 2010).

The five women filed suit under 42 U.S.C. §1983 against the Sheriff and the jail administrator, arguing that the Sheriff was deliberately indifferent in failing to train deputies about sexual assault. Both moved for summary judgment and qualified immunity, but the District Court only gave summary judgment to the jail administrator. The Court denied it as to the Sheriff and Livingston County. Following extensive litigation, Bezotte appealed for qualified immunity.

ISSUE: Is a neglect to train adequately actionable?

HOLDING: No

DISCUSSION: The Court noted that in this case, the §1983 claim against Sheriff Bezotte was "against him in his individual capacity" and thus is distinct from a claim against him in his official capacity.[105] A claim in the sheriff's official capacity is "merely another claim for a claim against the municipality." Since claims against the government entity are not subject to the qualified immunity defense, which can only be asserted by the individual.[106]

The Court continued:

> In a case such as this, where the supervisor is also the policymaker, an individual-capacity claim may appear indistinguishable from an official-capacity or municipal claim, but these failure-to train claims turn on two different legal principles. For individual liability on a failure-to-train or supervise theory, the defendant supervisor must be found to have "'encouraged the specific incident of misconduct or in some other way directly participated in it.'"[107] A plaintiff must demonstrate that the defendant supervisor "'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'" A mere failure to act will not suffice to establish supervisory liability.[108]

The Court contrasted this to a failure to train and supervise claim against a government entity, "such claims to not require direct participation in or encouragement of the specific acts; rather, these claims may be premised on a failure to act."[109] "

> A plaintiff must establish that the municipality, through its policymakers, failed to train or supervise employees despite: 1) having actual or constructive knowledge of a pattern of similar constitutional violations by untrained employees,[110] or 2)

[105] Kentucky v. Graham, 473 U.S. 159 (1985).
[106] Brennan v. Twp. of Northville, 78 F.3d 1152 (6th Cir. 1996); Myers v. Potter, 422 F.3d 347 (6th Cir. 2005).
[107] Phillips v. Roane Cnty., 534 F.3d 531 (6th Cir. 2008) (quoting Sheehee v. Luttrell, 199 F.3d 295 (6th Cir. 1999)).
[108] Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006).
[109] Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Heyerman v. Cnty. of Calhoun, 680 F.3d 642 (6th Cir. 2012).
[110] See Bd. of Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397 (1997).

> the fact that the constitutional violation alleged was a patently obvious and "highly predictable consequence" of inadequate training.

The Court continued:

> We highlight this crucial distinction between individual-capacity and official-capacity failure to-train-or-supervise claims because, in the instant case, whether sexual assault was an obvious consequence of inadequate training or whether a pattern of sexual misconduct in other counties sufficed for proving actual or constructive knowledge speaks to the County's liability for Bezotte's conduct in his official capacity. These questions do not bear on the qualified-immunity inquiry of whether Bezotte exhibited the much higher culpability standard of personal involvement.[111].

Using this analysis, the Court found that the Sheriff was entitled to qualified immunity. Public officials who violate a plaintiff's constitutional rights while acting under the color of law may be liable under 42 U.S.C. §1983. However, the qualified immunity defense bars individual liability where "a reasonable official in the defendant's position would not have understood his or her actions to violate a person's constitutional rights." Immunity "'gives ample room for mistaken judgments,'" protecting "'all but the plainly incompetent or those who knowingly violate the law.'"[112] Plaintiffs bear the burden of showing that a clearly established right has been violated and that the official's conduct caused that violation." In this case, although certainly sexual assault constituted a clearly established violation of the constitutional rights of the women, there was no assertion that any of the Sheriff's "personal actions violated those rights." To succeed, it would need to be proved that the Sheriff "took deliberate action or was otherwise involved in Boos' illegal acts." At best, they only proved that "that Bezotte inadequately trained road patrol deputies and failed to supervise Boos despite knowing that sexual assaults on inmates were occurring in other jurisdictions."

The Court agreed that Sheriff Bezotte was entitled to qualified immunity in his individual capacity, and that "that Bezotte inadequately trained road patrol deputies and failed to supervise Boos despite knowing that sexual assaults on inmates were occurring in other jurisdictions."

The Court declined to exercise jurisdiction over the County's appeal, however, leaving the question of the County's potential liability unresolved.

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[111] See Miller v. Calhoun Cnty., 408 F.3d 803 (6th Cir. 2005) (noting that the grant of qualified immunity was proper where there was no evidence of personal involvement, but the official-capacity claims were separate actions against the County analyzed under a deliberate-indifference inquiry)

[112] Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009) (quoting Hunter v. Bryant, 502 U.S. 224 (1991)).

42 U.S.C. §1983 – USE OF FORCE

McCaig v. Raber (Bangor City, MI, PD) 2013 WL 628420 (6th Cir. 2013)

FACTS: On January 1, 2008, Officer Raber and his partner responded to a fight call. As Officer Raber arrived, he saw McCaig strike someone In the face. He told McCaig he was under arrest, and McCaig raised his hands in a "surrender motion." He then held his his hands out to be handcuffed. He alleged that Officer Raber "smacked" the cuff on his wrist. He gave a detailed statement as to what occurred, with Raber ending up slamming McCaig to the ground, breaking his arm. Officer Raber claimed that McCaig tried to pull away, causing him to leg sweep him to the ground.

McCaig filed suit under 1983, arguing excessive force. Raber moved for summary judgement under qualified immunity, which was denied. Raber appealed.

ISSUE: Must a defendant concede all facts before raising a qualified immunity defense?

HOLDING: Yes

DISCUSSION: The Court noted that when "appealing a denial of qualified immunity, a defendant must be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal." Raber did not do this, instead asserting that "McCaig was resistant, or, at the very least, did not communicate an intent to comply with Officer Raber's commands."

Further, the Court agreed that qualified immunity requires a two tiered assessment. First, it must decide if a constitutional right would have been violated based on the facts, and second, whether that right was clearly established at the time.[113] The Court agreed that the right to be free from excessive force had long been clearly established.[114] "Reviewing the facts in the light most favorable to McCaig, a reasonable jury could find that Officer Raber's use of a takedown maneuver was not objectively reasonable" and a violation of the Fourth Amendment. The Court agreed whether the unreasonableness of using a takedown maneuver under the circumstances was clearly established at the time, and the Court agreed that it was, as it was, under McCaig's assertions, a "use of force on a non-resistant or passively-resistant individual." The Court affirmed the denial of qualified immunity.

Jackson v. Wilkins, 2013 WL 827725 (6th Cir. 2013)

FACTS: On May 29, 2007, Jackson assaulted his girlfriend, Wade, in Benton Harbor, MI. Wade fled to a nearby house and called the police. Officers Blaskie and Wilkins arrived and spotted Jackson leaving the house in a vehicle. Wade yelled that

[113] Saucier v. Katz, 533 U.S. 194 (2001).
[114] Graham v. Connor, 490 U.S. 386 (1989).

he was “stealing her car,” Wilkins tried to block him in, but was unsuccessful and Jackson sped off.

Jackson’ crashed after a brief chase, ending up in a field. Jackson did not comply with orders to get on the ground, instead walking toward Wilkins with his hands up. Wilkins “stiff-armed” Jackson, who stumbled back and then fled on foot. He ran into an alley and Blaskie tased him, the shock slamming him into the “metal arm of a nearby dumpster.” Blaskie stated that “Jackson did a ‘backflip’ around it.” He tried to continue to run, but was captured. The three struggled, with the officers punching, kicking and tasing him. He finally stopped resisting and he was handcuffed. Officer Alsup arrived as backup. Jackson was ordered to get up from the ground but he said he could not do so; he pleaded repeatedly (on the video) for help. He was finally picked up and laid across the back seat of Alsup’s car. The officers saw a bruise forming on his exposed chest. They drove back to the scene of the initial crash and searched the area, with Jackson remaining in the car. Officer Blaskie left. The other two officers stayed at the scene and at some point, Jackson was moved to Wilkins’ car. The discussed whether he should go to the hospital. Apparently Wilkins did not tell Alsup about Jackson’s collision with the dumpster, however. Alsup decided he could go to the jail and Wilkins did the transport.

Wilkins told jail staff that Jackson “had been tased and that he had some injuries” but did not specifically mentioned the dumpster collision. When the Berrien County deputies told Jackson to get out of the car, again he said he could not on his own. He was pulled out and carried to a cell and during that time, Wilkins saw Jackson had defecated on himself. Jackson was monitored in his cell, mostly remaining on the floor except for managing to pull himself onto the toilet three times. He vomited and continued to defecate on himself. Finally a nurse evaluated him and called an ambulance. Jackson died from a lacerated liver suffered when he collided with the dumpster.

Jackson’s estate “sued everyone involved” under 42 U.S.C. §1983, claiming both excessive force (Blaskie and Wilkins) and deliberate indifference to Jackson’s medical needs (everyone). The Estate also sued the City, the police chief, the County and the Sheriff. The trial court granted summary judgment based on qualified immunity to all defendants. The Estate appealed.

ISSUE: Is medical attention required for a subject he suffered a possibly serious injury?

HOLDING: Yes

DISCUSSION: First, the Court addressed the excessive force claims against Blaskie and Wilkins. To consider if force is reasonable, the Court looks at three factors: “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or

attempting to evade arrest by flight."[115] In this case, the factors supported the force used by the officers. Although apparently the agency prohibited tasing a running subject, there is no established law on that issue.[116] Although arguing too much force was used to subdue Jackson, the Estate conceded that he was the "strongest' and "most physical" subject the officers had fought. As such, a significant amount of force was warranted. The court upheld the summary judgment in favor of Blaskie and Wilkins on the excessive force claim.

With respect to the deliberate indifference claim, the Court looked to Harris v. City of Circleville.[117] The Court first applied the test, whether a defendant knew of a substantial risk to the prisoner, to Officer Wilkins. He knew of the collision with the dumpster and the subsequent fight, and he knew that Jackson said he could not get up and was moaning for help. He saw the bruising and Jackson's "rapid physical deterioration." The court agreed that the evidence indicated a serious internal injury, despite few outward physical marks. Wilkins' argument that he thought Jackson was intoxicated "rings hollow" – as he knew that he'd been able to be very physical just moments before. The Court disagreed with Wilkins' assertion that Jackson refused to go to the hospital, given what could be seen and heard on the video.

With respect to the delay in attention, for which there was no explanation, the Court noted that Wilkins' actions violated Benton Harbor policy that immediate medical treatment be made available after force was used and the subject is complaining of pain. Nor was he monitored as policy required, or taken to the hospital when he showed "unusual distress." Wilkins failed to share an important fact, the collision with the dumpster, with his supervisor.

He "repeated this mistake" at the jail when he did not tell them about the collision with the dumpster. The nurse later testified that had he known about it, he would have "sent Jackson directly to the emergency room." The Court agreed that the Estate had made sufficient proof of deliberate indifference on Wilkins' part. Blaskie, however, spent much less time with Jackson and left him in the hands of other officers. As such, he did not have the same obligation to pass on such facts about the potential injury. Alsup, as well, was an even easier case, as he did not know about the collision or the rapid change in behavior. Both Blaskie and Wilkins were entitled to qualified immunity on the deliberate indifference claim.

Likewise, the Court found that the four Berrien County officers had "little reason to believe that Jackson might be seriously injured" as they weren't told about the collision. What they did observe supported a belief, however, that he was extremely intoxicated instead and as such, qualified immunity was supported for them as well. With respect to the nurse, a confusion as to the time he entered the cell suggested a lengthy delay before calling for an ambulance, but other evidence supported that the delay was instead, very short. As such, the nurse was also entitled to qualified immunity.

[115] Hayden v. Green, 640 F.3d 150 (6th Cir. 2011).
[116] Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505 (6th Cir. 2012).
[117] 583 F.3d 356 (6th Cir. 2009).

Moving on to municipal liability, along with the Chief and the Sheriff, the Estate argued that Benton Harbor did not properly train its officers on its policies and orders. (In fact, the order being argued had not been issued at the time of the incident.) Officer Wilkins' one time failure does not indicate that he was not properly trained

The court affirmed the summary judgment on the part of all parties, with the exception of Officer Wilkins on the deliberate indifference claim.

42 U.S.C. §1983 – TASER

McAdam v. Warmuskerken, 2013 WL 1092729 (6th Cir. 2013)

FACTS: In July 2009, McAdam was riding as a passenger with his mother when the vehicle was stopped for defective taillights. His mother was asked to do FSTs. He got out of the car, twice, and then said "he could just walk home." He was "advised to go home or risk going to jail." As he walked away, however, he "began taping the officers," using his phone. Officers Warmuskeken, Wilson and Davila (Ludington, MI, PD) followed him, and at some point, told him he was under arrest for disorderly conduct." He was taken to the ground with a leg sweep and subdued. Despite that, however, he claimed he was tased at least four times. He was taken to the hospital, where he refused treatment until they returned his phone. (At this time he was handcuffed to the bed and the wheel's had been locked.) He claimed he was then tased 3 more times.

McAdam eventually pled guilty to assault and battery on the officers, but complained of excessive force. The officers argued for qualified immunity under Heck v. Humphrey.[118] Their motions were denied and they sought interlocutory review.

ISSUE: Is tasing a verbally non-compliant subject excessive?

HOLDING: Yes

DISCUSSION: The Court noted that McAdam must prove first, that the officers violated a constitutional right, and then, that the "right was 'clearly established' at the time the officer acted."[119] However, the officers cannot use the appeal "merely to quibble over the district court's assessment of the factual record and remain[] unwilling to accept the claimant's fact-supported version of events."

The Court broke the issues down. First, the Court agreed that an officer may not tase an individual "who is subdued on the ground and is not resisting arrest, even if the officer does so only once."[120] Next the Court stated that tasing was unlawful if done

[118] 512 U.S. 477 (1994).
[119] Saucier v. Katz, 533 U.S. 194 (2001).
[120] Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505 (6th Cir. 2012); Austin v. Redford Twp. Police Dep't, 690 F.3d 490 (6th Cir. 2012).

while an individual is "handcuffed to a hospital bed and is verbally resisting medical treatment, but does not pose a safety risk to hospital staff or police officers."

The Court then looked to the Heck argument, noting that if a claim successfully brought under 42 U.S.C. §1983 would invalidate an underlying criminal conviction, it is barred. However, in this case, McAdam's allegations concerned being tased after he was secured, and officers do not have license to tase "after the underlying events had already occurred and after McAdam was under control."

42 U.S.C. §1983 – BRADY

Vaughan v. City of Shaker Heights (OH), 2013 WL 518443 (6th Cir. 2013)

FACTS: Vaughan was accused of sexual assault of a 9-year-old girl. Det. Srsen behind the case, and Det. Hyams (Shaker Heights PD) was assigned to investigate, and ultimately, his work led to Vaughan being indicted for rape. He was convicted and appealed. However, after an investigation "revealed inconsistencies and questionable conduct in the investigation and prosecution," his case was retried and he was acquitted.

Vaughan filed suit under 42 U.S.C. §1983 against the detectives, the City, and other parties, for their "failure to reveal exculpatory evidence of a social worker's file and Hyam's testimony before the grand jury." The City moved to dismiss the claims. The Court agreed to dismiss some claims, but allowed to go forward claims concerning the failure to disclose exculpatory evidence, malicious prosecution, and intentional infliction of emotional distress, against Hyams, as well as the indemnification claim against the City. Hyams and the City appealed.

ISSUE: Are grand jury witnesses granted immunity for their statements?

HOLDING: Yes

DISCUSSION: Vaughan's §1983 claim is based upon testimony before the grand jury and the failure to disclose exculpatory evidence. The Court noted that in Rehberg v. Paulk, the Supreme Court had recently ruled that "grand jury witnesses should enjoy the same immunity as witnesses at trial" – in other words, absolute immunity.[121]

The Court dismissed the claims related to Hyam's testimony before the grand jury. For procedural reasons, the Court declined to consider the remainder of the appeal.

[121] 132 S.Ct. 1497 (2012).

42 U.S.C. 1988 – ATTORNEY'S FEES

Binta B. v. Gordon, 710 F.3d 608 (6th Cir. 2013)

FACTS: Following a complex class action lawsuit, the attorneys representing the class moved for attorney's fees under 42 U.S.C. §1988. They were awarded much of what was requested and the losing party (Tennessee) appealed.

ISSUE: Do actions taken to modify a judgment fall under the Attorney Fees' Act?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that 42 U.S.C. §1988 permitted a federal court to allow the "prevailing party" in a federal civil rights action (42 U.S.C. §1983) a "reasonable attorney's fee as part of the costs." To succeed on the merits, the plaintiff must "succeed on any significant issue … which achieves some of the benefits the parties sought in bringing suit"[122] or the "settling of some dispute which affects the behavior of the defendant towards the plaintiff."[123] In the underlying case, the plaintiffs were clearly prevailing parties, by virtue of a consent decree signed in 2003. However, as a result of financial issues, the state sought to make changes to the consent decree, and the attorneys worked to defend the decree from substantial modification, even though the original representatives of the class were no longer even in the case.

In previous cases, the Sixth Circuit had found that post-judgment work to ensure compliance of the original decree or to protect a remedy was compensable under the Act, even if not successful. However, subsequent case law indicated that "any action by a plaintiff to defend or enforce a prior consent decree must be 'necessary to enforce' the prior order and result in a subsequent court order or agency determination that at the very least 'secure[s] [plaintiff's] initial success in obtaining the consent decree."[124] In this case, although the Court agreed that there was some success, the amount of attorney's fees awarded by the trial court was excessive as they were not "reasonably expended" on the actual litigation at bar, not, as in this case, work that may have even been attributable to a separate case against the state.

The Court remanded the case for further specific evaluation of the claimed attorney's fees.

[122] Hensley v. Eckerhart, 461 U.S. 424 (1983).
[123] Hewitt v. Helms, 482 U.S. 755 (1987).
[124] Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986),

INTERROGATION

U.S. v. Tummins, 710 F.3d 608 (6th Cir. 2013)

FACTS: Deputy sheriffs went to the Tummins' home in Tennessee, to execute a search warrant on his home computers, looking for child pornography. The officers asked him if they could talk to him and inquired as to how he connected to the Internet. He took them upstairs to look at his cable modem. They told him that his IP address had been connected to "some shared child-pornography files." Tummins agreed that he had downloaded child pornography. "At the end of the encounter, Tummins signed an inculpatory statement."

Tummins was indicted and moved for suppression. The trial court granted the motion and the government appealed.

ISSUE: Does telling a subject they are not under arrest usually make the situation non-custodial?

HOLDING: Yes

DISCUSSION: The Court looked to whether Tummins was in custody for the purposes of Miranda.[125] The Court found no indication that the two deputies "forced Tummins to remain with them such that Tummins was in custody to the extent associated with a formal arrest." The court found significant that the "entire encounter took place in Tummins' home."[126] In addition, "when an officer tells a suspect that he or she is not under arrest, [the Court has] tended to find that the suspect was not in custody." The two deputies had emphasized that Tummins was not under arrest and that all they wanted was the computer.

The Court reversed the lower court's decision.

U.S. v. Simon, 2013 WL 195485 (6th Cir. 2013)

FACTS: While in custody in Ohio on a federal conviction, Simon was released on furlough to a Detroit halfway house. He initially tried to get the provided bus voucher to Detroit changed to Buffalo, NY, but was unsuccessful. He then travelled to Detroit and tried, unsuccessfully, to get the Canadian embassy to give him asylum. His brother finally picked him up, at their mother's home, and deposited him at the halfway house, where he was arrested by two U.S. Marshals. He was taken to the federal courthouse for questioning. He was given Miranda warnings prior to the questioning and he waived his rights, confessing to having announced his imminent defection to Canada and his refusal to go to the halfway house.

[125] Stansbury v. California, 511 U.S. 318 (1994); California v. Behler, 463 U.S. 1121 (1983).
[126] U.S. v. Panak, 552 F.3d 462 (6th Cir. 2009).

Simon was charged with Escape and moved for suppression of his confession. He was ultimately convicted, of escape. He appealed.

ISSUE: Is a promise of leniency necessarily coercive?

HOLDING: No

DISCUSSION: Simon argued that the marshals "promised him leniency and that their promises prevent his waiver from being knowing, intelligent, and voluntary." The standard is whether Simon knew he could "choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." Simon has testified he did, in fact, understand the rights. To find a confession involuntary due to coercion, it must be "objectively coercive, the coercion in questions must have been sufficient to overbear Simon's will, and the coercion must have been the crucial motivator in Simon's decision to confess."[127] The Court had ruled that in some cases ""a *promise* of lenient treatment or of immediate release may be so attractive as to render a confession involuntary."[128] The Court found the deputy marshals to be more credible, with them testifying that they denied promising that he would not be prosecuted for the escape.

Simon's conviction was affirmed.

U. S. v. Woods, 711 F.3d 737 (6th Cir. 2013)

FACTS: On June 15, 2010, Officer Mardigian (Lansing, MI, PD) spotted a speeding vehicle. He followed to car into a parking lot, where it stopped on its own. As Woods was getting out, the officer ordered him back into the car and to place his hands on the steering wheel. He did not comply, but instead kept reaching down into the passenger side. Officer Mardigian drew his weapon, and Woods finally complied. Upon demand, he produced a false name and denied having ID. He was arrested for driving without a license.

Because of Woods's actions, Officer Mardigian waited for backup before proceeding. When Officer Rasdale arrived, they approached to take him into custody. When he again reached into the passenger side, he was then seized, extracted and ordered to the ground. Woods was handcuffed and righted, at which point Officer Mardigian felt a "hard lump" in his pocket. Woods volunteered it was bogue (a street term for something illegal). He also said he had a gun, but that it was in the car. (The lump turned out to be keys.) After he was searched, the officers approached the vehicle, seeing a handgun on the floorboard. The gun was retrieved and crack cocaine was found as well.

Woods was indicted for the gun and the drugs, and argued for suppression, When that was denied, he took a conditional guilty plea and appealed.

[127] U.S. v. Miggins, 302 F.3d 384 (6th Cir. 2002).
[128] U.S. v. Wrice, 954 F.2d 406 (6th Cir. 1992) (emphasis added).

ISSUE: Is a non-responsive statement (that indicates possession of contraband) a product of interrogation?

HOLDING: No (but see discussion)

DISCUSSION: Woods argued that "his initial incriminating statement, as well as the discovery of a gun and drugs in his car, were the products of a custodial interrogation conducted in violation of his Fifth Amendment rights as articulated in Miranda v. Arizona,"[129] The Government argued several alternative grounds for admission of the statement. It argued that the officer's question was not an interrogation, that the question, if interrogation, was justified due to public safety, that physical evidence found as a result of a unwarned statement is admissible and finally, that its discovery was inevitable.

The Court chose the first argument as dispositive. The court agreed that that the statement was not interrogation under Rhode Island v. Innis.[130] It was, instead, a "natural and automatic response to the unfolding events during the normal course of an arrest." The items was "legitimately within the officer's power to examine as part of a search incident to arrest." The answer could have been either "innocuous or incriminating" - "to say that Officer Mardigian had the right to physically go through Woods's pockets but could not simply ask him, "What is in your pocket?' would be illogical." This was unusual in that the suspect divulged "incriminating information that ha[d] nothing to do with the question asked." It was a "simple, nontrick question." That he responded by volunteering that he had a gun in the car was not likely, and his "unexpected and unresponsive reply cannot retroactively turn a non-interrogation inquiry into an interrogation."[131] Simply because an officer was asking the question did not make the questioning "interrogation."

Woods's plea was affirmed.

TRIAL PROCEDURE / EVIDENCE – BRADY

U.S. v. Howard, 2013 WL 656780 (6th Cir. 2013)

FACTS: Chattanooga police responded to a stolen vehicle report – along with information as to where the car could be found. (It turned out to be a payment dispute between Howard and a friend who had sold him a car.) The officers, assuming that it was truly a stolen car, went to the location where the car sat (Howard's girlfriend's home). Howard came out and told them that the keys were inside the house but that they could not go inside without the girlfriend's permission. When she came back, she gave them permission to search for the keys, but that was not all they found.

[129] 384 U.S. 436 (1966).
[130] 446 U.S. 291, 301 (1980).
[131] See Tolliver v. Sheets, 594 F.3d 900 (6th Cir. 2009).

They also located a sawed-off shotgun, ammunition and a driver's license application and mail with Howard's name, showing that as his address.

Howard, a convicted felon, but charged for the weapon and ammunition. He was convicted and appealed.

ISSUE: Is non-crucial evidence required to be released under Brady?

HOLDING: No

DISCUSSON: Howard claimed that a miscommunication between forensic technicians and prosecutors that resulted in the non-disclosure of a fingerprint report. The Court agreed it was improperly withheld, but ruled that it was not "crucial" as Howard claimed. Although the prosecution said that no fingerprint tests were done, at trial, during cross, "one of the investigating officers said that the gun and bullets had been fingerprinted and that crime-scene technicians had a report." In fact, the report indicated they had only found inidentifiable smudges. For that reason, the trial court had ruled that the late disclosure was not prejudicial.

The Court agreed that a "successful Brady claim has three components: favorable evidence, suppression and prejudice."[132] Prejudice occurs when "there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." In this case, the Court agreed there was no prejudice because there was sufficient evidence that Howard possessed the gun and the ammunition. The lack of identifiable prints could not exonerate Howard, it was, at best neutral. Although Howard argued he could have had an expert look at the report, he was unable to show that an earlier disclosure would have changed the outcome.

The Court upheld Howard's conviction.

U.S. v. Macias-Farias, 706 F.3d 775 (6th Cir. 2013)

FACTS: Macias-Farias was charged with conspiracy to distribute marijuana, as a result of a delivery of 1600 pounds of marijuana. The truck driver told the DEA that he thought he was delivering produce to a location near Louisville and agreed to cooperate in making a controlled buy. He was directed to make the delivery in Shepherdsville, where vehicles registered to Macias-Farias and another individual entered and exited. Although the agents "claimed to have maintained visual surveillance of the truck all night, they learned that the load had been "surreptitiously off-loaded from the truck." Lacefield, who had been observed with the other men near the parked truck, agreed to cooperate. He set up a meeting and arranged for a transfer of about 100 pounds of marijuana. The DEA agents missed the buy but used Lacefield's information to "put out an alert" on a vehicle involved, driven by Babor. The vehicle was located and the driver arrested, the marijuana having been found in the vehicle.

[132] Strickler v. Greene, 527 U.S. 263 (1999).

Lacefield alerted the DEA that another large load was arriving on February 25, and they tracked Macias-Farias and another man until they made contact with the truck. (The load consisted of 3,766 pounds of marijuana.)

Macias-Farias was charged and convicted. He appealed.

ISSUE: Must a document be material to be required under Brady?

HOLDING: Yes

DISCUSSION: During the trial, Agent Moore (DEA) testified about a report he'd made concerning the Babor stop. The defense had objected as it had not been provided with that report. They later asked that Agent Moore's testimony be stricken or that they receive a mistrial, since the report was "3500"[133] material that should have been produced under Giglio and Brady. Since Babor was not available to be questioned, the Court agreed that it was improper but found it harmless error. (The jury was instructed to ignore the references to what Babor said.)

The Court agreed that to be Brady material, it must be favorable to the accused.[134] In this case, the Court ruled that the evidence was not shown to be "either exculpatory or suitable for impeachment purposes." The Court noted that the prosecution simply apparently "considered it irrelevant to the government's case." Further, the Court found insufficient proof that it was material to the case.

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Robertson v. Kerns (Warden), 2013 WL 979124 (6th Cir. 2013)

FACTS: Robertson was indicted in 2006 in Hamilton County OH on a variety of charges relating to the shooting of Willis. (He was also implicated for the shooting death of Cox.) He was convicted and appealed.

ISSUE: May an officer testify about what a witness told them?

DISCUSSION: No

HOLDING: During Robertson's trial, Det. Upchurch testified about statements from Willis, identifying Robertson as the shooter. Willis did not testify. The Court agreed that the introduction of the statements were error, but ruled it to be harmless error. The Court noted that two witnesses to the shooting did testify and identified him. Since the

[133] 18 U.S.C. 3500 – the Jencks Act.
[134] U.S. v. Douglas, 634 F.3d 852 (6th Cir. 2011); Strickler v. Greene, 527 U.S. 263 (1999).

testimony was essentially identical to what Det. Upchurch said, it could "take the place of" the inadmissible testimony

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

U.S. v. Kettles, 2013 WL 1164911 (6th Cir. 2013)

FACTS: At Kettles' trial for counterfeiting, evidence from his Facebook page, that linked to a YouTube video, was introduced, showing him throwing large amounts of money on the floor. The video itself wasn't introduced, but a private Facebook chat in which he stated the money was fake was admitted. He argued that the evidence was ambiguous that he was admitting that the money shown in the video was fake. Kettles argued that the chat was hearsay. The Court allowed its admission and he was convicted, he then appealed.

ISSUE: Is a statement adopted by the defendant (by their agreement with it) hearsay?

HOLDING: No

DISCUSSION: Kettles argued that although his friend made the statement that the money was fake, Kettles "manifested an adoption or belief in its truth" when he responded that he knew that was the case. As such, it was not hearsay.[135]

The Court affirmed the conviction.

Mitchell v. Kelly (Warden), 2013 WL 1197004 (6th Cir. 2013)

FACTS: At Mitchell's 2005 trial for murder, robbery and related charges in Columbiana County (OH), Dr. Graham, the Coroner, testified concerning an autopsy report prepared by Dr. Seligman. It was admitted over Mitchell's objections. The trial court ruled that the report was a business record and thus not hearsay. Mitchell was convicted and appealed.

ISSUE: Is it now permitted for someone other than the technician who prepared a report to testify about it?

HOLDING: No

DISCUSSION: Mitchell argued that the report was testimonial, and thus it was not permitted for anyone other than Dr. Seligman, who prepared it, to testify. The Court agreed that, at the time, such reports were not considered testimonial. Since that time, however, in Bullcoming v. New Mexico and Melendez-Diaz v. Massachusetts[136], the

[135] U.S. v. Jinadu, 98 F.3d 239 (6th Cir. 1996).
[136] 131 S.Ct. 2705 (2011); 557 U.S. 305 (2009).

Court had ruled that such forensic laboratory reports are testimonial. The Court agreed the lower court's decision was correct at the time.

Peterson v. Smith, 2013 WL 49565 (6th Cir. 2013)

FACTS: On December 1, 1999, Al-Rifai was killed while leaving his Detroit workplace. A co-worker , Obed, witnessed the shooting from 10 feet away and identified Peterson as the shooter. He observed an argument between Al-Rifai and Peterson some time prior to the shooting, but did not "have a good command of the English language" and did not know what the argument was about. Peterson returned several times during the evening and confronted Al-Rifai as he left the store. At the time Obed did not know Peterson's name, but knew him as a regular customer. When Peterson's home was searched, they found shotgun shells matching those left at the scene. He was finally apprehended on December 12.

Peterson was convicted. He appealed through the Michigan state court system, unsuccessfully. He took a habeas corpus petition which was denied, and appealed.

ISSUE: Do inconsistencies in description invalidate a suspect ID?

HOLDING: No

DISCUSSION: Peterson attempted to impeach Obed on the argument that his trial testimony did not match his earlier witness statements on several points. He described the jacket to the officer as "dark" and in court as "green" – for example, and there were discrepancies in how the argument was described. The Court, however, found the discrepancies to be minor.

Peterson also argued that his trial counsel should have tried to suppress Obed eyewitness visual and voice identification. The court noted that the Court had adopted a two-step approach for determining whether to exclude eyewitness identification testimony as a violation of due process in Neil v. Biggers[137] and Manson v. Brathwaite.[138]" First, it must "assess whether the identification was unnecessarily suggestive and then assess whether "under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification."[139] In Manson, the court identified five factors to consider "whether a suggestive identification was nonetheless reliable: (1) the opportunity to view the suspect at the time of the crime; (2) the degree of attention at the time of observation; (3) the accuracy of the prior description of the suspect; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time between the crime and the identification." Obed was only ten feet away, with a clear view and was paying attention, yet he was not the intended victim or in any apparent danger himself. His

[137] 409 U.S. 188 (1972).
[138] 432 U.S. 98 (1977).
[139] See Howard v. Bouchard, 405 F.3d 459 (6th Cir. 2005).

description was consistent and "he did not waver or indicate uncertainty about the identity of the shooter." The Court agreed that the identification was properly admitted.

Peterson also objected to the admission of evidence found at his home. The search was without a warrant but done with the "undisputed written consent of Peterson's mother, Janie Peterson, who owned that house and the house next door." The Court agreed that consent was a "well-recognized exception" to the search warrant requirement and that consent might be obtained "from one who has actual or apparent authority over the premises."[140] Although a later affidavit was introduced in which she said that there was an agreement that her son would be the only occupant of the address in question, in the initial report, she told the officer that Peterson was an "infrequent resident" there. The ammunition was found in plain view in the kitchen, where apparently Janie Peterson met and spoke to the officers.

The court denied Peterson's motion for habeas corpus.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Groves v. Meko, 2013 WL 765200 (6th Cir. 2013)

FACTS: Groves pled guilty in Kentucky to both Robbery 1st (KRS 515.020) and multiple counts of Wanton Endangerment 1st (KRS 508.060). He later asked that the pleas be set aside, arguing that the two charges violated the Double Jeopardy Clause. The Kentucky courts ultimately disagreed, and affirmed his convictions. He then took a habeas corpus petition in federal district court, which concluded that under Blockburger v. U.S.[141] no double jeopardy attached. Groves further appealed.

ISSUE: Are Robbery and Wanton Endangerment (relating to the same weapon) Double Jeopardy?

HOLDING: No

DISCUSSION: Groves continued to argue that the same conduct – pointing a firearm at the restaurant's employees – was an essential element for both the Robbery and the Wanton Endangerment charge. Applying the Blockburger analysis, the court agreed that the two charges "clearly proscribe different offenses." The Court noted:

> First-degree robbery requires proof of theft and first-degree wanton endangerment does not. First-degree wanton endangerment requires a manifestation of extreme indifference to the value of human life and first-degree robbery does not. In other words, a person can commit either of these offenses without committing the other.

[140] Illinois v. Rodriguez, 497 U.S. 177 (1990).
[141] 284 U.S. 299 (1932),

In light of U.S. v. Dixon[142] the Court agreed it was immaterial "whether the victims of Groves's wanton endangerment crimes were Wendy's employees and, thus, the charges "all emanated from the same conduct," as Groves claims." All that matters is whether the offenses are separate. Further, despite his argument to the contrary, there was no indication that Kentucky had a legal prohibition against pursuing both charges.

Groves' convictions were affirmed.

MISCELLANOUS

Hutten v. Knight / Maxwell, 2013 WL 1339083 (6th Cir. 2013)

FACTS: While driving on Brentwood, TN, Hutten saw officers "standing in the middle of the road in an attempt to catch speeders." He pulled over and allegedly said "someone's liable to get shot or run over standing the middle of the road." The officers insisted that Hutten specifically mentioned a gun; he denied it. Hutten went to the department later that day to file a complaint, and was informed he was to be charged with disorderly conduct. The charges were ultimately discharged. Hutten filed a lawsuit under 42 U.S.C. §1983 under the Fourth Amendment. The officers asserted qualified immunity. The trial court denied qualified immunity and the officers appealed.

ISSUE: Does a retirement of charges (a dismissal) constitute an admission of guilt?

HOLDING: No

DISCUSSION: The Court looked to whether the retirement of the charges was an "admission of guilt" by Hutten, pursuant to Heck v. Humphrey.[143] It did not determine whether the officers had probable cause to arrest Hutten. As such, the Court agreed there remained genuine issues of material fact as to whether the officers had probable cause to arrest Hutten.

EMPLOYMENT

Lilly v. City of Clarksville, 2013 WL 49568 (6th Cir. 2013)

FACTS: Lilly owned a bar in Clarksville, Tennessee. Prior to the opening of the club, but after Lilly was in possession, a sealed indictment indicated a known drug dealer was stopped after leaving the club. During a search warrant of the dealer's home, they found items linking him to the club. In August 2009, Lilly took a job as a civilian criminal investigative supervisor with Fort Campbell. When TBI informed Pace, with Clarksville PD, that Lilly was working with CID, pace told them that he found Lilly suspicious because of his apparent link with the drug dealer. In December, 2009, Fort

[142] 509 U.S. 688 (1993).
[143] Supra.

Campbell CID followed up, getting copies of the information. Officer Ashby told CID that he would nto share any confidential information with CID so long as Lilly was working there. She was subsequently terminated. (There were also issues with the licensing of a security company that worked at the club.)

Lily filed suit against Ashby and other with Clarksville PD for racial discrimination. The Court granted summary judgment and Lilly appealed.

ISSUE: Is proof of intent necessary in a racial discrimination case?

HOLDING: Yes

DISCUSSION: To succeed in a claim for racial discrimination, Lilly must prove that the officers acted under state law and that she suffered a deprivation of a constitutional right as a result.[144] The Court noted that she never provided any proof that "a state actor purposefully discriminated against her on the basis of her race." The Court, however, found no indication of a racially discriminatory intent or purpose, as her only proof was references to much earlier instances by the department.

The Court upheld the dismissal.

PRIVILEGE

Chittick v. Lafler (Warden), 2013 WL 518413 (6th Cir. 2013)

FACTS: Chittick, a Michigan deputy sheriff, was convicted on multiple counts of sexual offenses against minor victims. During the investigation, a trooper executed a search warrant on Chittick's home and seized his computer. A number of documents were found that were password protected, that turned out to be versions of what had happened by Chittick and his wife, prepared for his attorney. The prosecutor received and reviewed the documents.

On the first day of trial, defense counsel learned of this and it was agreed that the privileged documents would not be used. During the trial, Chittick's wife testified against him. Chittick was convicted and appealed.

ISSUE: Are attorney client communications privileged?

HOLDING: Yes

DISCUSSION: The Court agreed that "government actions which obtain defense strategy information are improper under the Sixth Amendment."[145] Here, the Court noted, officers "purposefully opened documents which they knew contained privileged

[144] Thomas v. City of Chattanooga, 396 F.3d 426 (6th Cir. 2005).
[145] Weatherford v. Bursey, 429 U.S. 545 (1977).

attorney-client information, and shared those documents with the prosecutor." However, the Court found no apparent prejudice in the trial as a result of the use of the documents. The Court affirmed his conviction.